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October 3, 2013

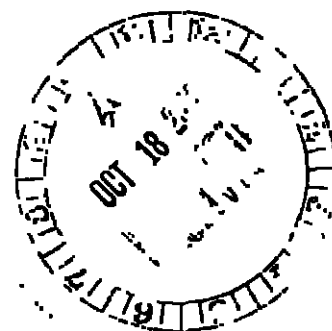
VIA FEDEX PRIORITY OVERNIGHT

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

ENTERED
Office of Proceedings

OCT 18 2013

Part of
Public Record



Re: *Wichita Terminal Association, et al. v. F.Y.G. Investments, Inc., et al*
Finance Docket No. 35765

Dear Ms. Brown:

Enclosed for filing on behalf of the Wichita Terminal Association, BNSF Railway Company, and Union Pacific Railroad Company are the original and 10 copies of a Petition for Declaratory Order. Also enclosed is our firm check in the amount of \$1,400.00 in payment of the filing fee for the Petition.

Please contact me if you have any questions or need further information. Thank you for your attention to this matter.

FEE RECEIVED

OCT 18 2013

**SURFACE
TRANSPORTATION BOARD**

Enclosures

cc: Wyatt A. Hoch
Charles R. Curran
James Oliver

Very truly yours,

Lathrop & Gage LLP

By: 

K. Paul Day

FILED

OCT 18 2013

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TRANSPORTATION BOARD**

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BEFORE THE
SURFACE TRANSPORTATION BOARD

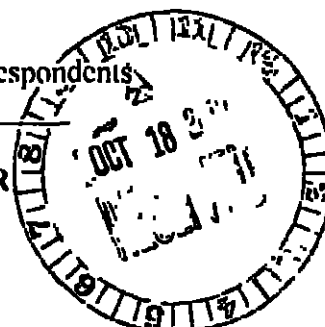
FINANCE DOCKET NO. 35765

WICHITA TERMINAL ASSOCIATION, BNSF RAILWAY COMPANY, and UNION
PACIFIC RAILROAD COMPANY, Petitioners

v.

F.Y.G. INVESTMENTS, INC. and TREATCO, INC., Respondents

PETITION FOR DECLARATORY ORDER



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Dated: October 3, 2013

BEFORE THE
SURFACE TRANSPORTATION BOARD

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WICHITA TERMINAL ASSOCIATION, BNSF RAILWAY COMPANY, and UNION
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PETITION FOR DECLARATORY ORDER

INTRODUCTION

Pursuant to 5 U.S.C. § 554(c), 49 U.S.C. § 721 and two Kansas state court orders,¹ Petitioners Wichita Terminal Association, BNSF Railway Company, and Union Pacific Railroad Company (collectively the "WTA") request that the Surface Transportation Board ("Board" or "STB") institute a proceeding and issue a declaratory order finding that Respondents' demand for a permanent public railroad crossing to ingress and egress their undeveloped property that is immediately to the south of Wichita Terminal Association's railroad interchange tracks (the "IT") is preempted by federal law. In the alternative, if the Board deems an IT crossing necessary, the WTA proposes that the current location of a thirty-two (32) foot temporary crossing at the west end of the IT that has been made available for Respondents to use for more than five (5) years be made permanent.

¹ On July 2, 2013, the Kansas Court of Appeals directed the Kansas District Court of Sedgewick County to enter an order "requiring the WTA to file [a petition] with the Board to resolve any issues concerning the Board's jurisdiction." (Exhibit A at 18). On August 21, 2013, the District Court issued its order directing the WTA "to file [a petition] with the Board to resolve any issues concerning the Board's jurisdiction no later than October 4, 2013." (Exhibit B at 3).

In filing this Petition, the WTA contends that the Board should assert its jurisdiction and find preempted the removal, relocation and/or reconstruction of any portion of the IT to accommodate F.Y.G.'s demand for a crossing located basically in the center of the IT. Such a crossing location would cause undue interference with and unreasonably burden interstate commerce. Installing a crossing in the center of the IT will harm shippers and their customers, as well as the railroad carriers who use and rely on the IT. As such, the WTA request the Board use its discretion to determine that federal law preempts F.Y.G.'s demand for a crossing or, in the alternative, that the location of the temporary crossing be made permanent because it causes substantially less harm to interstate commerce.

FACTUAL BACKGROUND

The WTA file this Petition in an attempt to resolve an 11-year Kansas state-court dispute between the WTA and Respondents F.Y.G. Investments, Inc. and Treatco, Inc. (collectively "F.Y.G.").² Located in Wichita, Kansas, the Wichita Terminal Association is owned by two Class I railroads, the BNSF Railway Company ("BNSF") and Union Pacific Railroad Company ("UP"). The Wichita Terminal Association owns and operates the IT which were built between 1889 and 1916. F.Y.G. owns property to the south of the IT.

The IT are double main line tracks located in the right-of-way of 25th Street in Wichita, Kansas (Exhibit C). 25th Street is a public street that runs east to west. (Exhibit C). The approximate length of the IT is 1,000 feet (Exhibit D at 38.1-4). The IT parallels 25th Street in the public street right-of-way and connects with main line tracks owned by BNSF. These BNSF tracks are to the west and interchange with the IT (Exhibit E). The IT also switches with tracks owned by UP which are to the east of the IT (Exhibit F). These main line tracks all move

² Treatco, Inc. leases the property adjacent to the WTA's tracks from F.Y.G. Investments, Inc.

freight in interstate commerce. The IT are used to interchange railcars between BNSF, UP and various shippers. They are also used to temporarily store railcars when necessary to facilitate interchange. Traffic along the IT often reaches approximately 90 railcars per day (Exhibit D at 64:16-19). Without fully functioning IT, such interchange movements would back railcars up to the BNSF and UP tracks for extended periods of time. Such a result would halt flow traffic along these key BNSF and UP arteries and delay interstate rail traffic through Wichita with potentially detrimental effects on traffic throughout the BNSF and UP rail networks.

The WTA serves numerous rail customers within and outside of Wichita, all of whom are engaged in interstate commerce. Such customers include Bartlett Grain, Beachner Grain, Cargill Oil, Cargill Terminal Elevator, Cereal Food Processors, Glickman Metal Recycling, Horizon Milling, Lusko Brick, and National By-Products. The WTA transports several commodities across the IT including agricultural products such as wheat, milo, corn, barley malt, flour and soybeans; aggregates such as clay, granite, billet ore and plastics; other material such as bricks, lumber, steel and paper, and chemicals such as petroleum distillates, waste oil and fuel additives. Ninety percent of all products shipped through the IT go outside the State of Kansas. (Exhibit D at 63.9-64.19). The IT are a vital artery in interstate rail transportation.

In 1996, F.Y.G. Investments, Inc. purchased land immediately adjacent and to the south of the IT. Shortly thereafter, F.Y.G. sought a permanent railroad crossing from 25th Street to its property. As part of a development plan, F.Y.G. proposed Emporia Court as a public road that could extend from its property across the IT to 25th Street (Exhibit G). To date, the proposed Emporia Court road has not been built. F.Y.G.'s plan calls for the Emporia Court crossing to be located in the center of the IT. (Exhibit G).

In addition to being preempted, the demand for access across the center of the IT to and from the proposed Emporia Court road would result in the application of the Manual on Uniform Traffic Control Devices ("MUTCD"), which Kansas and Wichita have adopted as law. The MUTCD sets the clearance requirements for constructing railroad crossings, and requires the placement of crossbuck and other warning devices at a minimum of fifteen (15) feet from the nearest rail at any rail crossing. *See* Exhibit D at 24:25-26:2, *see also* Exhibit H – location of warning devices at the proposed crossing near the center of 25th Street. Under the MUTCD, the proposed Emporia Court crossing would force the WTA to place warning devices near the center of the 25th Street public right-of-way, and essentially block the eastbound lane of travel (Exhibit I – location of briefcase represents required location of warning devices on 25th Street). Such a warning device location violates the MUTCD, which prohibits the placement of crossing protections near the center of public streets.

Furthermore, and as the Exhibit G diagram illustrates, the proposed Emporia Court crossing would functionally cut the IT in two, dramatically limiting the WTA's ability to interchange railcars between these vital BNSF and UP arteries and stall traffic along these interstate rail networks. Moreover, as discussed below, the proposed Emporia Court crossing would reduce the interchange capacity of the IT by nearly two-thirds causing severe interference with interstate commerce by effectively halting interchange traffic on the IT. The proposed Emporia Court crossing is not a viable location for F.Y.G. to access their property, particularly because F.Y.G. has other available means of access at the temporary crossing to the west and at other locations to the south. (Exhibit J; *see also* Exhibit E – referencing the location of the temporary crossing)

During the Kansas litigation, as required by the Kansas District Court, the WTA installed a 32-foot temporary crossing at the west end of the IT to provide F.Y.G. access to their property from 25th Street (Exhibit J). The temporary crossing is located on the west side of the IT, to the west of the first switch, and therefore only crosses one set of tracks. As Exhibit K illustrates, the temporary crossing location causes less disruption to traffic on the IT because it is located near the end of the IT, traverses only one interchange track, provides a broader sight path for automobile and train traffic, and has a substantially smaller impact on the interchange capacity of the IT and, therefore, on interstate rail traffic. (Exhibit D at 70.16-71:1)

PROCEDURAL HISTORY

On November 6, 2002, Wichita Terminal Association filed a petition in the Kansas District Court of Sedgwick County against F.Y.G. seeking to enjoin F.Y.G. from interfering with the WTA's use of the IT.³ F.Y.G. filed a counterclaim, asserting that it had a right of access across the tracks as an abutting landowner. After both parties moved for summary judgment, the District Court granted summary judgment in the WTA's favor, finding the WTA had a right to operate and maintain the tracks pursuant to a license granted under a Wichita ordinance, and that the WTA had no legal duty to provide F.Y.G. ingress and egress over the tracks. The Kansas Court of Appeals reversed and remanded for a determination of two questions: (1) F.Y.G.'s right to ingress and egress over the IT; and (2) whether 25th Street is a public road.

On February 20, 2007, the WTA and F.Y.G. appeared before the District Court for a hearing on F.Y.G.'s request for a permanent crossing over the IT. On August 1, 2008, the District Court entered a permanent injunction ordering the WTA to: (1) construct a crossing to allow ingress and egress for F.Y.G.'s abutting property and directing the WTA to keep the

³ BNSF and UP were later added as parties.

crossing clear in accordance with the Wichita City Code; (2) renew discussions with the City of Wichita to determine where a crossing shall be constructed . . . with the least impact on interstate commerce; and (3) work out the issue of F.Y.G.'s right of ingress and egress so as to reach the best economic alternative with the least impact on interstate commerce. The District Court ordered "a permanent railroad crossing at least 32 feet in width at the point where the centerline of the dedicated Emporia Court intersects the railroad tracks [with] . . . railroad crossing protection in compliance with Federal Railroad Administration ["FRA"] requirements." The WTA was not required to construct the permanent crossing until the F.Y.G. provided the WTA with sealed engineering drawings for the construction of Emporia Court.

WTA met the first requirement by building a temporary 32-foot timber crossing at the west end of the IT, which it still maintains today. The parties could not agree on the location of a permanent crossing that would minimize the impact on interstate commerce. Nor did they meet the third requirement, having never held discussions with the City of Wichita.

On December 18, 2008, F.Y.G. provided the WTA a set of sealed engineering drawings for the construction of Emporia Court street. On April 2, 2009, F.Y.G. filed in the District Court a Motion to Appear and Show Cause because the WTA had not constructed a permanent railroad crossing at the proposed Emporia Court location. On May 8, 2009, the WTA filed a Motion for Relief from Judgment or Order pursuant to K.S.A. 60-260(b), claiming that compliance with the August 1 Order was impossible because: (1) the Federal Railroad Administration has no railroad crossing protection requirements; and (2) building a crossing at the prescribed location was impossible without impeding motor vehicle traffic on the adjacent 25th Street. In a June 8, 2009 hearing, the District Court found that "the installation of crossing protection signage at the

Emporia Court location was practically impossible without impeding upon the unimproved 25th Street.”

At this June 8 hearing, the District Court, *sua sponte*, and for the first time, suggested removing the north railroad track at 25th Street to accommodate the construction of a crossing at Emporia Court. The WTA immediately questioned the District Court’s authority to order track removal, as such authority is within the exclusive jurisdiction of the STB pursuant to the ICCTA.

Nevertheless, on July 20, 2009, the District Court entered its Order requiring the WTA to construct a 32-foot wide crossing at 25th Street and the proposed Emporia Court location that: (1) complies with all federal, state, and local laws, regulations and ordinances; and (2) shall not impede in any manner in the public right-of-way of 25th Street. The court further ordered removal of the north track in the area of the crossing “if that is the only means to construct the crossing and crossing protection without impeding upon 25th Street.”

On October 23, 2009, the WTA appealed the District Court’s order to the Kansas Court of Appeals arguing, in part, that the July 20 Order was preempted by the ICCTA. The Court of Appeals reversed and remanded the July 20 Order because there was no evidence presented that removal of the north IT would bring the crossing into compliance with the MUTCD without impeding the public right-of-way. The court ordered the District Court to allow both parties to present evidence on crossing options and their impact on interstate commerce. On November 21, 2011, the District Court held such a hearing. The District Court entered its order on January 25, 2012.

Ignoring the issues of ICCTA preemption and interstate commerce, the January 25 Order rejected use of the temporary crossing location. In mandating the Emporia Court location, the Court also rejected the “widening of 25th Street to create ample clearance for crossing-protection

signage . . . because of its impact on the existing business owners ” Thus, the January 25 Order found that “the most viable option for providing access to F.Y.G.’s real property is removal of the north track coupled with the laying of a new track south of the existing tracks,” and that “removal of the north track would allow the Emporia Court location to be built in compliance with the MUTCD ” Based on these findings, the District Court ordered that the WTA must “complete construction of the permanent crossing [at Emporia Court] by April 1, 2012.” In the interim, the District Court required the WTA to “keep open the temporary timber crossing at the northwest corner of F.Y.G.’s property . . . to provide ingress and egress from 25th Street to F.Y.G.’s property.”

On June 15, 2012, the WTA appealed that order to the Kansas Court of Appeals arguing, in part, that it was preempted by the ICCTA because this Board has exclusive jurisdiction over: (1) track removal and construction; (2) main rail line activity; and (3) any mandated crossing that would unreasonably burden interstate commerce

On July 2, 2013, the Kansas Court of Appeals affirmed the WTA’s preemption argument. In reversing the January 25 Order and requiring the filing of this Petition, the Court of Appeals held that: (1) the WTA timely raised its ICCTA preemption argument; (2) the STB has exclusive jurisdiction over the track removal/relocation question; and (3) the STB has exclusive jurisdiction to determine whether constructing a permanent crossing at Emporia Court is impossible or would unreasonably burden interstate commerce. The Court of Appeals acknowledged that for an Emporia Court crossing to be possible “the STB must either relinquish its jurisdiction to the district court or approve of the removal and reconstruction of track to allow for the installation of a permanent railroad crossing at Emporia Court ” (Exhibit A at 17)

ARGUMENT

I. The Proposed Emporia Court Crossing Would Unreasonably Burden Interstate Commerce.

The Board should reject the Emporia Court crossing proposed by F.Y.G. Should the Board institute a proceeding, F.Y.G. is expected to ask the Board to either (1) relinquish its jurisdiction to the Kansas District Court, or (2) approve of the removal of the north IT track and the relocation of the entire IT as part of the installation of a permanent railroad crossing at the proposed Emporia Court. Both of these anticipated requests infringe upon the clear language and intent of federal law and the purpose of this Board, which is to regulate interstate commerce in the most practical way possible so as to minimize the impact on interstate rail operations.

The Board's authority to resolve this dispute so as to minimize the impact on interstate rail commerce is beyond dispute. The Commerce Clause of the Constitution (art. 1, § 8, cl. 3) gives Congress plenary authority to legislate with regard to activities that affect interstate commerce. Congress has exercised this authority with respect to interstate railroads. In the Interstate Commerce Act, Congress has established a comprehensive scheme of federal rail regulation, which is "among the most pervasive and comprehensive of federal regulatory schemes." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). It vests the Board with broad jurisdiction over "transportation by rail carrier," 49 U.S.C. § 10501(a)(1), which extends to property, facilities, instrumentalities or equipment of any kind that are used for that transportation. *See* 49 U.S.C. § 10102(9). Such authority obviously covers railroad tracks, including the tracks located at the site of crossings with public or private roads.

A. The IT Are Main Line Tracks Over Which the STB Has Full Regulatory Control, Especially Over Acts that Would Cause Track Removal/Relocation or Otherwise Harm Interstate Commerce.

1. *The ICCTA Vests Exclusive Jurisdiction in the STB over All Main Line Track Abandonment, Removal and Relocation.*

The District Court cannot force the WIA to remove or relocate the north track because the ICCTA expressly preempts Kansas law when state action would affect matters directly regulated by the Board. See *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 332 (5th Cir. 2008), *CSX Transp., Inc. -Petition for Declaratory Order* 2005 STB LEXIS 675, 2005 WL 1024490, at *2-3 (Surface Transp. Bd. May 3, 2005). “[T]he remedies provided under [the ICCTA] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. § 10501(b). The ICCTA preempts offending state law or state court action regardless of its intent, so long as its effect is to exert control over some aspect of transportation by rail carrier. See *Wisconsin Central, Ltd. v. City of Marshfield*, 160 F. Supp.2d 1009, 1014 (W.D. Wis. 2000).

In that vein, the Board has exclusive jurisdiction over abandonment of rail lines regulated under 49 U.S.C. § 10901, i.e. main line track. See *Barrois*, 533 F.3d at 332 (quoting *CSX Transp., Inc.*, 2005 STB LEXIS 675, at *2-3) (“[T]here can be no state or local regulation of matters directly regulated by the Board — such as the construction, operation, and abandonment of rail lines....”); *Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 323 (1981) (“Congress granted to the [STB] plenary authority to regulate, in the interest of interstate commerce, rail carriers’ cessations of service on their lines. And at least as to abandonments, this authority is exclusive”). “The exclusive and plenary nature of the [STB’s] authority to rule on carriers’ decisions to abandon lines is critical to the congressional scheme, which contemplates comprehensive administrative regulation of interstate commerce.” *Kalo Brick*, 450 U.S. at 321.

This exclusive STB jurisdiction expressly applies to forced track removal and relocation efforts by state courts. *CSX Transp., Inc. v City of Plymouth*, 92 F. Supp. 2d 643, 659 (E.D. Mich. 2000) ("To the extent the state law at issue here is viewed as requiring the railroad to undergo substantial capital improvements, such as upgrading its class of track, relocating its yards, or upgrading speed along its "wyces," it is preempted by the ICCTA, which vests exclusive jurisdiction in the STB over such matters"). Exclusive STB jurisdiction also applies to effort to condemn railroad tracks and right-of-way in ways, like here, that hinder interstate commerce. *See Union Pac. R.R. v Chi. Transit Auth.*, 647 F.3d 675, 681 (7th Cir. 2011) (holding that under circumstances similar to those here "there is no question that the condemnation would be preempted by federal law because it would have a significant impact on railroad transportation by preventing Union Pacific from using the property for railroad transportation and by unreasonably interfering with existing transportation on the neighboring tracks"). Federal court and Board precedent are clear: only the Board has the authority to require abandonment, removal, or relocation of the IT.

2. *As a "Part of the Actual Transportation Haul from Shipper to Consignee," the IT Are Main Line Tracks Whose Forced Abandonment Lies under Exclusive STB Jurisdiction.*

As key conduit in the movement of rail commerce "from shipper to consignee," the IT are main line tracks over which the STB has exclusive jurisdiction. *New Orleans Terminal*, 366 F.2d at 163. This inquiry rests on two factors — the IT's daily use and their purpose. "It is well established that the determination of whether a particular track segment is a 'railroad line,' requiring the [STB's] authorization pursuant to § 10901(a), or a 'spur, industrial, team, switching, or side' track, exempt from [STB] jurisdiction... turns on the intended use of the track segment, not on the label or cost of the segment." *Nicholson v. ICC*, 711 F.2d 364, 367 (D.C.

Cir. 1983) Whether "a track segment is or is not identified as a 'spur, industrial, team, switching, or side' track is not determinative of this question. *Nicholson*, 711 F. 2d at 368. See also *Texas & P. Ry v Gulf Colo. & S F Ry.*, 270 U.S. at 274-79 (track segment identified as "industrial" track fell under STB jurisdiction), *New Orleans Terminal Co. v Spencer*, 366 F 2d 160, 165-66 (5th Cir. 1966) (same for segment identified as "side" track).

Federal courts and the Board have both provided helpful guidance on applying the "use" test. Courts "give considerable weight and due deference to the STB's interpretation of the statutes it administers unless its statutory construction is plainly unreasonable." *Emerson v. Kan City S Ry. Co.*, 503 F.3d 1126, 1130 (10th Cir. 2007) (quoting *R R. Ventures, Inc. v Surface Transp Bd.*, 299 F.3d 523, 548 (6th Cir 2002)). According to the Board, although under 49 U.S.C. § 10901-06 "use [i]s the controlling factor in determining the character of track for the purpose of finding exceptions to our jurisdiction, we may not allow the focus on use to obscure the larger purpose and effect of the [track]." *Effingham Railroad Co.*, STB Docket No. 41986, 2 S.T.B. 606, at *7 (September 12, 1997); see also *Texas Central Business Lines Corp.*, STB Finance Docket No 33997, at *2 (September 20, 2002) (holding track to be a main "tail line" subject to STB jurisdiction when it constituted that "carrier's entire line of railroad" or enabled a railroad to serve customers that it could otherwise not reach).

Federal courts have echoed this focus on a track's "larger purpose and effect" when evaluating STB's exclusive jurisdiction

[T]rack segments which are intended to be used to carry through trains between points of shipment and delivery, particularly those segments which extend a railroad's service into new territory, must be approved by the Commission pursuant to section 10901(a). On the other hand, track segments which are merely incidental to, and not required for, a railroad's service between points of shipment and delivery are exempted from the requirements of section 10901(a) by section 10907(b).

Nicholson, 711 F.2d at 367.

The Fifth Circuit in *New Orleans Terminal Co v Spencer*, 366 F.2d 160 (5th Cir. 1966) recognized that removal of New Orleans Terminal track fell exclusively under STB jurisdiction. In language strikingly similar to that used previously to describe the IT, the Fifth Circuit described the New Orleans Terminal as:

moving and interchanging freight shipments between the railroads coming into New Orleans from the east and northeast and those from the west and northwest. It is the conduit for the flow of freight traffic through New Orleans from East to West and West to East, providing a connection not only between other components of the Southern Railway System but also serving the other lines in and out of New Orleans

New Orleans Terminal, 366 F.2d at 162. Jefferson Parish passed an ordinance requiring the effective abandonment of a second line and a shorter interchange track operated by the New Orleans Terminal. *Id* at 163.

Focusing on the use and purpose of the tracks, not their classifications, the Fifth Circuit found these tracks to be main (not spur) lines under exclusive STB (then known as the ICC) jurisdiction. It noted that the New Orleans Terminal "is engaged in the handling of freight movements, both interstate and intrastate, from, to and through the metropolitan area of New Orleans. Tracks B and C, in no small part, are utilized in the handling of these traffic movements." *Id*. at 166. The Court further noted that "[t]he use of the tracks as passing tracks, for the temporary storage of cars and for occasional switching operations does not make them any the less 'lines of railroad' since they are used substantially in the through movement of freight." *Id* See also *Effingham Railroad Co.* STB Docket No. 41986, 2 S.T.B. 606, at *7 (September 12, 1997) (holding that track was a main line under exclusive STB jurisdiction even though it was used "solely for switching operations" because it aided and expanded the through movement of freight).

Here, the WTA uses the IT in an almost identical fashion to the two tracks at issue in *New Orleans Terminal*. Given the IT's extensive use in the through movement of freight through Wichita, the IT are main railroad lines and key to "moving trains between points of shipment and delivery...." *Nicholson*, 711 F.2d at 367. According to then-WTA Superintendant Jason Moyer:

The interchange track in question here . . . are what ties the BNSF and the UP to the WTA. All traffic, both again multiple commodities, grain, all customer traffic that is served in Wichita Central goes across these two interchange tracks. All bridge, we call it bridge move traffic, between BNSF and UP interchange traffic that goes, disperses all across the United States, also goes over these two tracks.

(Exhibit L at 22:4-18)

The IT is the sole conduit through which, according to Mr. Moyer, "all traffic that enters Wichita is served or is directed towards customers in Wichita .." (Exhibit L at 17:23-18:11). As Wichita's link between the BNSF and the UP, all customer traffic that is interchanged in Wichita Central goes across these two tracks. A nonfunctioning IT would force numerous rail cars to obstruct BNSF and UP's Wichita arteries, causing major disruptions in interstate commerce. Thus, the IT are rail lines whose Court-ordered partial abandonment falls under the Board's exclusive jurisdiction because the IT host "traffic movements which are part of the actual transportation haul from shipper to consignee." *New Orleans Terminal*, 366 F.2d at 163.⁴

⁴ Even if the IT are deemed "spur, industrial, team, switching, or side" track, rejection of an Emporia Court crossing is still required. Under ICCTA the Board lacks "licensing authority over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks" 49 U.S.C. § 10906.

That provision does not remove ICCTA preemption from "spur, industrial, team, switching, or side tracks." Instead, Section 10906 merely prevents the Board from mandating railroad actions over side/spur tracks while still preempting state jurisdiction over them. *Port City Props. v. Union Pac. R.R.*, 518 F.3d 1186, 1188-89 (10th Cir. 2008). In reaching this important holding, the Tenth Circuit explains that:

§ 10906 has been interpreted to preclude all regulation of industrial or spur tracks: "When sections 10906 and 10501(b)(2) are read together, it is clear that Congress intended to remove STB authority over the entry and exit of these auxiliary tracks, while still preempting state jurisdiction over them, leaving the construction and disposition of them entirely to railroad management."

3. *Even Without Forced Track Abandonment, the Proposed Emporia Court Crossing Falls under Exclusive STB Jurisdiction Because It Would Unreasonably Hinder Interstate Rail Commerce.*

Even if abandonment of the north track is not required, the District Court still cannot order the Emporia Court crossing because the ICCTA preempts state court action under the implied preemption doctrine where “the scope of a statute indicates that Congress intended federal law to occupy a field exclusively” (i.e. occupation of the field preemption). *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002) (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995)). Congress intended the Board to exclusively regulate all railroad matters that unreasonably burden interstate rail commerce, even those (such as railroad crossings) not specifically referenced in the ICCTA. *See Barrois*, 533 F.3d at 332 (“It is well settled that states cannot take an action that would have the effect of foreclosing or unduly restricting a railroad’s ability to conduct any part of its operations or otherwise unreasonably burdening interstate commerce.”) (quoting *CSX Transp. Inc.*, 2005 STB LEXIS 675, at *4) The ICCTA, therefore, preempts any state court effort to impose a rail crossing regardless of track removal if the construction of this crossing would unreasonably burden interstate commerce. *Id.* at 332-33.

This determination is fact-specific. According to the Tenth Circuit, it requires “a factual assessment . . . as to whether requiring the Railroad to remedy the injury claimed by the landowners would have the effect of preventing or unreasonably interfering with railroad transportation.” *Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1133 (10th Cir. 2007) The effect of the proposed crossing “must not be so draconian that it prevents the railroad from

Port City, 518 F.3d at 1188 (quoting *Cities of Auburn and Kent*, 2 S.T.B. 330, 1997 WL 362017 at *7 (1997)) (emphasis added).

Thus, Section 10906 does not substitute state-court jurisdiction for that of the Board, it keeps ICCTA preemption intact while limiting the Board’s ability to regulate these auxiliary tracks. *See Pace v. CSX Transp. Inc.*, 613 F.3d 1066, 1069 (11th Cir. 2010) (“[T]he language of section 10501(b) plainly conveys Congress’s intent to preempt all state law claims pertaining to the operation or construction of a side track.”); *Cedarapids, Inc. v. Chi. Cent. & Pac. R.R. Co.*, 265 F. Supp. 2d 1005, 1013-14 (N.D. Iowa 2003) (same)

carrying out its business in a sensible fashion....” *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 254 (3d Cir. 2007). In essence, the ICCTA preempts state action if that remedy to F.Y.G.’s claim “would have the effect of foreclosing or unduly restricting [the WTA’s] ability to conduct any part of its operations or otherwise unreasonably burdening interstate commerce.” *Barrois*, 533 F.3d at 332. See also *Maumee & W. R.R. Corp. and RMW Ventures, LLC-Petition for Declaratory Order*, STB Finance Docket No. 34354, 2004 STB LEXIS 140, 2004 WL 395835, at *2 (S.T.B. March 2, 2004) (same); *CSX Transp. Inc.*, 2005 STB LEXIS 134, 2005 WL 584026 at *8 (S.T.B. 2005) (ruling that a D.C. law that prohibited transporting hazardous material within 2.2 miles of the U.S. Capitol without a permit was preempted even when enacted for the compelling state concern of preventing terrorism). For all of these reasons, as recognized by the Kansas Court of Appeals, the decision on where and whether an IT crossing may exist rests exclusively with the Board.

B. The Proposed Emporia Court Crossing Would Unreasonably Burden Interstate Commerce by Rendering the IT Useless as a Conduit for Interstate Rail Traffic.

1. *An Emporia Court Crossing Damages Interstate Rail Commerce Even with a Two-Track IT.*

Whether using an “abandonment” or an “as applied” analysis, the Board should reject the proposed Emporia Court crossing because it would “unduly restrict [the WTA’s] ability to conduct any part of its operations . . . [and] unreasonably burden[] interstate commerce.” *Barrois*, 533 F.3d at 332.

The Emporia Court crossing would effectively end the WTA’s operations on the IT. First, this proposed crossing would slash the IT’s railcar capacity. Kansas law requires that railcars stay “a reasonable distance” from a crossing when not in motion. Kan. Ad. Reg. 82-5-8(c) (2013). According to industry guidelines, experts, and the laws of most states, a “reasonable

distance" is 250 feet from the edge of a crossing. (Exhibit D at 39:8-22). The IT has approximately 850 feet of usable space per track. (Exhibit D at 37:13-38:21). The crossing itself would be 32 feet wide. Because the proposed Emporia Court street would approximately bisect the IT, that would leave about 160 feet per track on either side of the crossing for use by the IT. The railcars that are interchanged over the IT are approximately 60 feet long. (Exhibit D at 40:14-18). Thus, even with the current two-track configuration, the Emporia Court crossing would reduce the IT's storage capacity from 30 railcars to at most 12 (or 3 per track per side of the crossing). (Exhibit D at 40:16-41:22). Such limited storage capacity would greatly hinder, and possibly even halt, interchange activity on the IT.

An Emporia Court crossing would also substantially slow interchange traffic along the IT, dramatically decreasing the number of cars that could be moved from BNSF to UP tracks in Wichita. Kansas law prevents the WTA from keeping trains in the court-ordered crossing for more than 10 minutes, after which all trains must stay 250 feet from the crossing Kan. Stat. Ann. § 66-273 (2013). Not only would these restrictions slow each interchange move, but the decreased IT capacity would increase the number of overall moves needed to interchange these railcars.⁶ Approximately 90 cars have traversed the IT per day with numerous cars coupled, uncoupled, and recoupled on the IT during these interchange activities. (Exhibit D at 64:16-66:11) By drastically increasing the number of required interchange moves and increasing the time needed for each move, the proposed crossing would ultimately back up traffic onto the main line. This railcar back-up, combined with the railroad gymnastics needed to comply with these onerous requirements, would substantially hinder traffic on the adjoining BNSF and UP arteries thus unreasonably burdening interstate commerce.

⁶ Compliance with Wichita's ordinance which sets the time limit to 5 minutes would have a more disastrous effect, as the number of overall moves needed to interchange would go from 2-3, to 7-8. See Wichita Code § 12.04.080. *see also* (Exhibit D at 67:15-68:8).

2. *Track Removal Would Further Devastate Interstate Rail Commerce through Wichita.*

- a. *Removal and relocation of the north track is an unreasonable burden on interstate commerce because it eliminates car storage capacity on the IT.*

The aforementioned burden on interstate commerce occurs if the WTA is required to install the crossing while maintaining the current two-track IT configuration. As explained below, however, because: (1) Kansas law and public safety would likely require removal of the north IT in order to build the proposed Emporia Court crossing; and (2) relocation of that track to land south of the current IT is unfeasible—installing the proposed crossing would likely force the WTA to eliminate the north track

Such a result would be catastrophic for the WTA and interstate rail commerce through Wichita. Loss of one track would cut IT capacity in half, from 12 cars to 6. *See supra* at 16-17. This track removal would increase the number of required interchange moves from the current 2-3 moves to 14-16. In other words, imposition of an Emporia Court crossing would likely decrease the IT's capacity by 80% and cause a sevenfold increase in the required amount of interchange moves. Such a result is unsustainable for the only interchange facility in Central Wichita

- b. *The WTA cannot relocate the north IT because it does not own the land immediately south of the IT.*

F.Y.G. has attempted to remedy these track-removal difficulties by proposing a southern relocation of the north IT. F.Y.G.'s effort must fail, however, because the relocation is both illegal and infeasible. On January 25, 2012, the District Court accepted F.Y.G.'s proposal "ordering the removal of the north track and the laying of a new line south of the existing line."

This relocation, however, was not a viable option for the District Court nor is it one available to the Board. F.Y.G., not the WTA, owns the property "south of the existing line." The WTA lacks any right of way on that land. Even Kansas courts lack jurisdiction to relocate

the IT in the manner proposed because the Kansas legislature has deprived courts of jurisdiction over eminent domain and condemnation proceedings.

An eminent domain proceeding is a special statutory proceeding and is not a civil action covered by the code of civil procedure. The proceeding is administrative rather than judicial, and its nature is the same whether conducted by or before a district court, or any judge thereof, the probate court, or its judge, a board of county commissioners or any other official board or tribunal authorized by the legislature to act in that capacity.

Miller v Bartle, 283 Kan. 108, 113, 150 P 3d 1282, 1286 (2007) (citations and emphasis omitted); *see also* K.S.A. 26-501 *et seq.* (eminent domain procedure). In short, Kansas law does not authorize a district court to condemn property. *See* K.S.A. § 26-101 *et seq.*

Likewise, this Board may not use eminent domain to condemn the land needed for a southern relocation of the IT. *See, e.g., Dakota, Minnesota, & Eastern R.R. v. South Dakota*, 236 F. Supp. 2d 989, 1009, 1012 (D.S.D. 2002) (holding that “STB approval . . . does not carry with it any federal power to take land to complete the project.” “If Congress would have intended to supplant such a basic state power, it could have delegated its own eminent domain power or made the preemption of state eminent domain law express in nature.”) Rather, the ICCTA has been held to preempt eminent domain proceedings, such as here, where the state action would “prevent or unreasonably interfere with railroad operations.” *Maumee & W. R.R. Corp.*, STB Fin. Docket No. 34354 (S.T.B. March 3, 2004); *accord Dist. of Columbia v. 109,205.5 Square Feet of Land et al.*, No. Civ.A. 05-202, 2005 WL 975745, *3 (D.D.C. Apr 21, 2005).

Eminent domain is possible “only when the right of eminent domain is invoked by a party with the power to do so.” *United States v. Hardage*, 58 F.3d 569, 577 (10th Cir. 1995). Here, no party has initiated a condemnation proceeding, nor did they (or the District Court) have the power to do so under these facts. *See generally Whitehead v. Allied Signal, Inc.*, No. 98-6305, 1998 WL 874868 (10th Cir. Dec. 16, 1998) (unpublished opinion); *Hardage*, 58 F.3d at

569. Thus, the Board cannot order condemnation of the southern property and relocation of the IT to that land, nor should it relinquish authority to the District Court to do so, because the WTA cannot be legally required to reconstruct the IT on property which it does not own.

c *No evidence in the record indicates that a southern relocation of the IT would be feasible.*

A track relocation further merits rejection by¹ the Board because no evidence exists that such relocation is possible. *Wichita Terminal Ass'n v. F.Y.G. Investments, Inc.*, No. 103,015, 2011 WL 588505, 11 (Kan. Ct. App. Feb. 11, 2011) (unpublished opinion) (holding that an order is unwarranted where compliance with that order is impossible or where no evidence supported the feasibility of the ordered actions).

The District Court received no evidence on the ability to build track south of the existing IT or the impact of such new track on IT operations, including the WTA's ability to properly align the IT with BNSF and UP tracks. Nor has F.Y.G. provided such support for their proposal. That is because, according to the evidence at trial, neither the WTA nor F.Y.G. had previously discussed such a possibility. Richard Mooney, the WTA's safety consultant, testified that he did not know of any study done on relocating the north section of the IT to F.Y.G.'s property or of any conversations between the WTA and F.Y.G. on the matter. (Exhibit D at 51:1-22). None of the F.Y.G. witnesses discussed relocating the IT onto their property and neither party introduced evidence on the matter. Nor did F.Y.G. provide any support for the feasibility of their proposal on appeal.

Far from finding that a new southern track could be built, the District Court actually called some of the land south of the existing IT "a low point and a virtual swamp with a creek running through it." While the WTA disputes this characterization, if considered true, it calls into question the feasibility of relocating the north IT as F.Y.G. will almost certainly propose

II. Installation of the Proposed Crossing Is Impossible and Would Violate Kansas Law Irrespective of Its Impact on Interstate Commerce.

As the previous pages illustrate, the proposed Emporia Court crossing would have such a catastrophic impact on interstate rail commerce through Wichita that it merits rejection by the Board. Independent of that reason, however, this crossing merits rejection because it would violate Kansas law and numerous crossing safety guidelines.

A. The Proposed Crossing Would Cause the WTA to Violate Kansas Law or Cease Operations

First, the proposed Emporia Court crossing would force the WTA to violate Kansas law and Wichita ordinances. Kansas law prohibits railroads from blocking crossings for more than 10 minutes, and Wichita's ordinance sets the time to 5 minutes. *See* K.S.A. § 66-273; Wichita Code § 12 04.080. As stated above, under Kansas law railcars must stay "a reasonable distance" or 250 feet from a crossing when not in motion. If they fail to do so, as would likely occur given the number and complexity of interchange moves that the proposed crossing would mandate, law enforcement authorities could require WTA's representatives to break the train apart into several pieces within five minutes after arrival to allow ingress and egress through the crossing.

The WTA could not comply with such onerous requirements on these busy and vital interchange tracks, especially when compliance (even if possible) would cause severe bottlenecks and delays from backed-up traffic on the other UP and BNSF main lines thus hindering interstate rail traffic through Wichita. The proposed crossing location is at the nerve center of WTA's operations. The Emporia Court crossing, with or without track removal, would thus require the WTA to cut any length of train extending for more than a couple of cars (Exhibit D at 64:20-71:1). Because the movement between the BNSF and UP lines through the IT requires a series of shove (or push) movements that often last more than 5 minutes (under

Wichita law), the IT's interchange activity would be severely jeopardized by the Emporia Court crossing. Put simply, therefore, the Emporia Court crossing would likely either shut-down the IT or require it to operate in violation of Kansas law. Either scenario merits rejection of the proposed crossing by the Board.

B. The Emporia Court Crossing Would Also Violate Basic Safety Guidelines of the MUTCD.

Second, the Board should reject the proposed crossing because it violates the MUTCD. Kansas and Wichita have adopted the MUTCD as providing the legal requirements for constructing railroad crossings. K S A. § 8-2003 (2008); WICHITA, Ks., CODE § 11.20.020 (2009) "With the adoption of the Manual on Uniform Traffic Control Devices for Streets and Highways by the State Highway Commission pursuant to legislative authorization, these regulations have the force and effect of law." *Watts v St Louis-San Francisco Ry. Co.* 216 Kan. 160, 173-74 (1975) (quoting *Brown v. State Highway Commission*, 202 Kan. 1, 15, 444 P. 2d 882 (1968)).

The proposed Emporia Court crossing cannot comply with Kansas and Wichita law as adopted through the MUTCD. MUTCD requires placement of the crossbuck and other crossing warning devices 15 feet from the tracks. MUTCD 2009 Edition, Chapter 8 at §8B.04(11) (<http://mutcd.fhwa.dot.gov/pdfs/2009r1r2/mutcd2009r1r2edition.pdf>) (mandating a minimum 15-foot distance measured perpendicular from the nearest rail). MUTCD also prohibits the placement of crossing protections in the middle of a public road. *Id.* at §8A.04 ("No sign or signal shall be located in the center of an undivided highway...").

The WTA could not comply with both of these Kansas and Wichita legal requirements at the proposed Emporia Court crossing. The interchange tracks are located in the 25th Street right-of-way. Thus, given the 15-foot requirement for the placement of warning signs under MUTCD,

construction of a crossing at Emporia Court would force the WTA to place its crossing warning devices in the middle of 25th Street (Exhibit D at 24:12-28:19). *See also* (Exhibit H); MUTCD at § 8B.04(11). Even the District Court that ordered the crossing recognized this inevitable result, stating that it was “practically impossible” to place a crossing at Emporia Street Court “without impeding upon the unimproved 25th Street, and declining “to order the installation of crossing protection that would create a hazard to the public by impeding into 25th Street.” Nonetheless, by ordering this crossing (and by recommending it, as F.Y.G. likely will here), the District Court violated its own requirement that the crossing not impede in any manner on the public right-of-way of 25th Street.

III. If the Board Decides Not To Find Installation of the Crossing Preempted, It Should Choose the Temporary Crossing Location, Establish a Procedural Schedule, or Provide Specific Instructions for the District Court.

Board precedent is clear that a state court cannot order installation of a crossing where the crossing would unduly interfere with interstate commerce. The WTA maintains that it has presented sufficient evidence herein for the Board to reject the proposed crossing because it would unduly harm interstate rail commerce. Should the Board find insufficient evidence in the record on this issue, the WTA requests that the Board institute a proceeding and establish a procedural schedule for the parties to submit evidence needed for the Board to make this determination as it did in *Louisville & Indiana Railroad -- Petition for Declaratory Order*, STB Docket No. FD 35536 (Served Feb 22, 2012).

The WTA also recognizes that Board has, in some circumstances, found state or federal court the proper forum to determine undue interference rather than a Board proceeding. As noted above, this matter has been pending in state court for over a decade. At this point, resolution is far more likely to come from Board action rather than continued state court litigation. Should the Board determine that state court remains the proper forum, however, the

WTA requests that the Board issue specific instructions for that court to follow regarding factors it must consider to determine undue interference. These factors should include the affect of a crossing on the rail operations such as: (1) safety of operation; (2) number of car movements required; (3) dwell time of cars on the IT; (4) dwell time of cars waiting to move to the IT, (5) service to customers in Wichita; and (6) network fluidity in the Wichita area on the WTA, BNSF and UP. These factors will guide the parties and assist them in reaching a timely resolution of this long-standing state court action.

If the Board decides to permit a crossing and select the crossing location itself, the temporary crossing provides the optimal location because it minimizes the impact on interstate commerce while providing a safe crossing location that complies with Kansas law.

The temporary crossing minimizes disruption to traffic on the IT because it is located near the end of those tracks. Thus, the temporary crossing costs the IT only 250 feet of space of useable track from the crossing instead of 500 feet with the Emporia Court proposal (loss of 250 feet on both tracks). Likewise, the temporary crossing traverses only one interchange track, thus removing less total track from effective interchange use. Thus, placing the crossing at that location would reduce IT capacity by only 4-5 railcars, instead of the 18-24 lost from an Emporia Court crossing (Exhibit D at 42.3-20)

Moreover, the temporary crossing would be a far safer option than F Y G's proposal. It would provide a broader sight path for automobile traffic and train workers, thus increasing visibility and safety for both. (Exhibit D at 42.21-43 11). The temporary crossing would also avoid the need to place crossing signs in 25th Street, thus complying with the MUTCD and promoting safer driving on that road.

Finally, over the past 3 years, F.Y.G. has substantially improved the portion of their property which leads to the temporary crossing. A Google Earth image from July 2010 establishes that virtually no path existed over the F.Y.G. property near the temporary crossing (Exhibit M). However, a February 2013 Google Earth Image establishes that overgrown grass has been replaced with dirt roads over F.Y.G.'s property, which are comparable to the public 25th Street (Exhibit K). For these reasons, the temporary crossing should be made permanent.

CONCLUSION

The Board has exclusive jurisdiction to determine whether F.Y.G.'s demand for a crossing is preempted. The Board should not relinquish its jurisdiction to the District Court, nor should it approve of the removal and relocation of track to allow for the installation of a permanent railroad crossing based on the undue harm that such a crossing would cause to interstate commerce. If the Board finds a crossing necessary, the WTA proposes that the current temporary crossing that has been made available for F.Y.G. to use for more than five (5) years be made permanent. In the alternative, the Board should either establish a procedural schedule for receiving evidence to resolve the issue of undue interference or provide specific instruction to the District Court for addressing this issue.

Dated: October 3, 2013

Respectfully submitted,



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ATTESTATION AND VERIFICATION

I, K. Paul Day, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this Petition for Declaratory Order

Executed on October 3, 2013


K. Paul Day


STATEMENT REGARDING SERVICE

I hereby certify that on this 3rd day of October, 2013, I have served Respondents in this proceeding with this Petition, including all attachments thereof, via Federal Express, postage pre-paid, upon the following counsel of record.

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EXHIBIT LIST

Exhibit A – July 2, 2013 Kansas Court of Appeals Modified Opinion

Exhibit B – August 21, 2013 Kansas District Court of Sedgwick County Order On Third Remand

Exhibit C – Google Maps Image of the IT and 25th Street

Exhibit D – November 21, 2011 Transcript of Bench Trial

Exhibit E – Google Maps Image of BNSF's Main Line Tracks Running Parallel to N. Broadway Street and Interchanging with the IT

Exhibit F – Google Maps Image of UP's Main Line Tracks Interchanging with the IT and Running Parallel to 25th Street

Exhibit G – Google Maps Image Illustrating Proposed Emporia Court Location

Exhibit H – Crossing Diagram Showing Location of Warning Devices

Exhibit I – Pictures Illustrating Location of MUTCD Warning Devices

Exhibit J – Picture of Temporary Crossing

Exhibit K – February 2013 Google Earth Image of Temporary Private Crossing

Exhibit L – June 9, 2009 Transcript of Motions

Exhibit M – July 2010 Google Earth Image

EXHIBIT A

Modified Opinion

No 107,666

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

WICHITA TERMINAL ASSOCIATION, BURLINGTON NORTHERN & SANTA FE RAILWAY
COMPANY, and UNION PACIFIC RAILROAD COMPANY,
Appellants,

v.

F.Y G INVESTMENTS, INC., and TREATCO, INC ,
Appellees.

SYLLABUS BY THE COURT

1.

The Supremacy Clause of Article VI of the United States Constitution, which establishes the doctrine of federal preemption, invalidates state laws that interfere with, or are contrary to, federal law.

2.

Because federal preemption involves an interpretation of law, appellate courts have an unlimited standard of review.

3

Federal preemption is ultimately a question of congressional intent. Express preemption occurs when Congress makes its intent known through explicit statutory language. Implied preemption occurs when Congress does not expressly preempt state law, but its intent to do so can be inferred from a statutory or regulatory scheme.

4.

The Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. 10101 *et seq.* (2006), created the Surface Transportation Board to regulate rail transportation in the United States 49 U.S.C. § 10501(a)(1) (2006).

5.

Congress has granted the Surface Transportation Board exclusive jurisdiction over the construction, acquisition, operation, abandonment, or discontinuance of railroad tracks and facilities. Furthermore, Congress has expressly stated that the remedies with respect to regulation of rail transportation set forth in the ICCTA are exclusive and preempt other remedies provided under federal or state law 49 U.S.C. § 10501(b).

6.

The ICCTA preempts all state or local laws that may reasonably be said to have the effect of managing or governing the operations of a rail carrier.

7.

States and municipalities may continue to exercise traditional police powers to protect public health and safety so long as the application of such laws or regulations has only a remote or incidental effect on rail transportation.

8.

The Surface Transportation Board has exclusive jurisdiction over the question of whether a rail carrier should be required to remove existing railroad track and construct a new track in order to install a permanent railroad crossing at a specific location. It is also within the exclusive jurisdiction of the Surface Transportation Board to determine whether requiring the construction of a permanent railroad crossing at a specific location unreasonably burdens or interferes with interstate commerce.

Appeal from Sedgwick District Court; JOSEPH BRIBIESCA, judge Original opinion filed May 31, 2013. Modified opinion filed July 2, 2013 Affirmed in part, vacated in part, and remanded with directions

Jeffrey R. King, of Lathrop & Gage LLP, of Overland Park, and *K Paul Day* and *Doug Dalgelish*, of the same firm, of Kansas City, Missouri, for appellants

James D. Oliver, of Foulston Siefkin LLP, of Overland Park, and *Wyatt A. Hoch*, of the same firm, of Wichita, for appellees

Before PIERRON, P.J., BRUNS and POWELL, JJ.

BRUNS, J : This is the third appeal in a dispute over access to real property. The Wichita Terminal Association, Burlington Northern & Santa Fe Railway Company, and Union Pacific Railroad (collectively WTA) own and operate railroad tracks in Wichita. F.Y.G. Investments, Inc., and Treatco, Inc. (collectively FYG) own real property adjacent to the WTA's tracks. In 2008, the WTA was ordered to provide access—by way of a permanent railroad crossing—from a public street to FYG's real property.

In the present appeal, although the WTA does not dispute the district court's authority to require it to install a permanent railroad crossing to provide access to FYG's property, it contends that federal law preempts state courts from requiring interstate rail carriers to remove or reconstruct existing tracks in order to install a permanent railroad crossing. Specifically, the WTA argues that provisions of the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. 10101 *et seq.* (2006), preempted the remedies ordered by the district court in a journal entry filed on January 25, 2012. Because we find that federal preemption is applicable to some of the remedies ordered by the district court, we affirm in part, vacate in part, and remand with directions.

FACTS

Wichita City Ordinance No. 5436—which was enacted in 1916—grants the WTA the right to construct, operate, and maintain railroad tracks along 25th Street in Wichita. Pursuant to the ordinance, the WTA continues to own and operate two sets of parallel railroad tracks that run within a 30-foot right-of-way located south of 25th Street. Burlington Northern & Santa Fe and Union Pacific use the tracks as an interchange to move rail traffic between their rail lines. In addition, they temporarily store railcars on the tracks to facilitate the interchange of rail traffic.

In 1996, FYG purchased approximately 27 acres of undeveloped land directly to the south of the WTA's railroad tracks. After the WTA began repairing its railroad tracks in September 2002, FYG claimed that the WTA was a trespasser. Thereafter, on November 6, 2002, the WTA initiated this action, seeking to enjoin FYG from interfering with its right to maintain the railroad tracks. In response, FYG filed a counterclaim requesting an easement to allow vehicles to cross the WTA's tracks in order to access its property from 25th Street.

The district court granted summary judgment in favor of the WTA on January 7, 2004, finding that FYG had no legal right to ingress and egress across the WTA's railroad right-of-way. The district court also found that the city ordinance gave the WTA the right to construct, operate, and maintain railroad tracks along 25th Street. On appeal, a panel of this court reversed the district court's ruling and remanded the case to the district court "to determine if an injunction to provide ingress and egress [was] appropriate." See *Wichita Terminal Association v. F.Y.G. Investments, Inc.*, No. 92,132, 2005 WL 824042, *4 (Kan App. 2005) (unpublished opinion) (*Wichita Terminal Association I*).

On February 20, 2007, the district court held an evidentiary hearing on remand. After hearing the testimony of several witnesses, the district court announced its decision on the record. The district court found that 25th Street—although undeveloped—is a public street and that the city ordinance required the WTA to provide ingress and egress over its railroad tracks to FYG's real property. In addition, the district court announced that it was entering a mandatory injunction requiring the WTA to construct and install a permanent railroad crossing and, in the interim, to keep a temporary crossing open to provide access to FYG's land adjacent to the railroad tracks. Following the hearing, the district court filed a minute order and directed FYG's attorney to prepare a journal entry.

Because the parties could not agree on the terms of the journal entry, one was not filed until August 1, 2008. In the journal entry, the district court ordered the WTA to.

"construct and install, within 90 days after [FYG's] presentation to [the WTA] of scaled engineering drawings . . . , (i) a permanent railroad crossing at least 32 feet in width at the point where the centerline of the dedicated Emporia Court street intersects with the railroad tracks, and (ii) permanent railroad crossing protection in compliance with Federal Railroad Administration requirements."

No appeal was filed from this journal entry, and it became a final order of the district court.

On December 18, 2008, FYG presented the WTA with a set of engineering drawings approved by the City of Wichita for the construction of a permanent railroad crossing at Emporia Court. Under the terms of the journal entry, the WTA was obligated to complete a permanent railroad crossing at Emporia Court by March 22, 2009. Because work on the project had not commenced as of April 2, 2009, FYG filed a motion for order to appear and show cause. The motion requested that the court hold the WTA in contempt for failing to begin work on the Emporia Court crossing and for failing to keep the temporary crossing open as required by the journal entry filed on August 1, 2008.

In response, the WTA moved for relief from judgment under K.S.A. 60-260(b). In the motion, the WTA argued that the installation of a permanent railroad crossing at the Emporia Court location would be impractical, if not impossible, because the placement of crossing protection devices would impede the public right-of-way on 25th Street and would violate the Manual on Uniform Traffic Control Devices (MUTCD). Moreover, in its response to FYG's contempt motion, the WTA also argued that the Surface Transportation Board (STB) had express or implied jurisdiction to review the matter under the ICCTA because a railroad crossing at Emporia Court would have a substantial impact on interstate commerce.

On June 9, 2009, a different district judge conducted an evidentiary hearing to consider both FYG's contempt motion and the WTA's K.S.A. 60-260(b) motion. At the hearing, the judge questioned an employee of Burlington Northern & Santa Fe regarding whether the WTA could construct the Emporia Court crossing in compliance with the MUTCD if it removed the north track to allow more room for the placement of crossing protection devices. The judge also questioned the employee regarding whether the WTA could install an underpass or overpass at Emporia Court.

At the conclusion of the hearing, the district court granted the WTA's K.S.A. 60-260(b) motion and denied FYG's contempt motion. Specifically, the district court found that "the installation of traffic protection for a crossing over two tracks at Emporia Court is practically impossible . . . without impeding traffic on the unimproved 25th Street." Hence, the district court concluded that the WTA had shown good cause for failing to timely construct and install a permanent crossing at Emporia Court. The district court, however, rejected the WTA's suggestion that the permanent crossing be placed at the location of the temporary crossing because no appeal was taken from the journal entry filed on August 1, 2008.

In a journal entry entered on July 20, 2009, the district court ordered the WTA.

"to construct and install (i) a permanent railroad crossing at least 32 feet in width at the point where the centerline of the dedicated Emporia Court Street intersects the railroad tracks, and (ii) permanent railroad crossing protection in compliance with all federal, state, and local laws, regulations, and ordinances. This crossing shall not impede in any manner in the public right-of-way of 25th Street. [The WTA] must remove the north track in the area of the crossing if that is the only means to construct the crossing and crossing protection without impeding 25th Street . . . [The WTA] must construct the crossing and crossing protection within 90 days after the entry of [this] Journal Entry . . . All other provisions of the August 1, 2008 Journal Entry . . . will remain in effect."

On the same day the journal entry was filed, the WTA filed an objection to the proposed journal entry, arguing that it contained inaccurate statements and failed to remedy the problems with the August 2008 journal entry. Further, the WTA argued that the district court exceeded its jurisdiction and authority because the removal of railroad tracks falls under the exclusive jurisdiction of the ICCTA. The WTA also argued that because of its substantial impact on interstate commerce, the ICCTA impliedly preempted an order requiring removal of the north track. In addition, the WTA argued that even if the north track were removed, compliance with the MUTCD was not possible without placing crossing protection devices that would impede 25th Street. The WTA also requested that the action be stayed so that it could "pursue appropriate authorizations from the STB before proceeding any further with any proposed scenario that would require interference with the existing tracks." It appears from a review of the record that the court never ruled upon the objection or the request for stay.

In the second appeal, a panel of this court affirmed the district court's granting of the WTA's K.S.A. 60-260(b) motion "based on the impossibility of the remedy ordered" in the journal entry filed on August 1, 2008. But the panel reversed that portion of the

district court's ruling in which it "sua sponte required a remedy [of removal of a railroad track] that was neither proposed by the parties nor supported by the evidence."

Accordingly, the case was again remanded to the district court to "give both parties a limited time period in which to propose and address the options for viably implementing the injunction in compliance with the MUTCD, including but not limited to removal of the north track at Emporia Court and/or any other legally compliant crossing." Although the panel mentioned the issue of federal preemption, it did not reach the issue in its opinion *Wichita Terminal Association v. F.Y.G. Investments, Inc.*, No. 103,015, 2011 WL 588505, at *11 (Kan. App. 2011) (unpublished opinion) (*Wichita Terminal Association II*)

Following the second remand, the original district judge held an evidentiary hearing. Following the hearing, the district court entered a journal entry filed on January 25, 2012, finding that "the most viable option for providing access to F.Y.G.'s real property is removal of the north track coupled with the laying of a new track south of the existing tracks." Moreover, the district court found "that removal of the north track would allow the Emporia Court location to be built in compliance with the MUTCD." Based on these findings, the district court ordered that the WTA must "complete construction of the permanent crossing [at Emporia Court] by April 1, 2012." In the interim, the district court required the WTA to "keep open the temporary timber crossing at the northwest corner of F.Y.G.'s property . . . to provide ingress and egress from 25th Street to F.Y.G.'s property." Once again, the issue of federal preemption was not decided.

Subsequently, the WTA filed a timely notice of appeal.

ANALYSIS

Contentions of the Parties .

In the present appeal, the WTA contends that the ICCTA preempted the remedies ordered by the district court on January 25, 2012. Specifically, the WTA argues that the ICCTA places the construction and removal of railroad track under the exclusive jurisdiction of the STB. Moreover, the WTA contends that the remedies imposed by the district court unreasonably burden interstate commerce. The WTA, however, does not challenge the district court's jurisdiction to require it to provide access to FYG's real property from the adjacent public street.

In response, FYG makes three arguments. First, FYG contends that the WTA did not timely raise federal preemption as a defense. Second, FYG argues that even if the issue of federal preemption was raised in a timely manner, it is not a justification for the WTA to deny FYG's previously determined right of access to a public street. Third, FYG contends that the district court's order was reasonable because the Emporia Court location is the most viable option for a permanent railroad crossing and that the crossing can be constructed in compliance with the MUTCD.

Federal Preemption of State Law

The Supremacy Clause of Article VI of the United States Constitution establishes the doctrine of federal preemption:

"This Constitution and the Laws of the United States which shall be made in Pursuance thereof, . . . shall be the supreme law of the Land, and the Judges in every State shall be

bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding " U.S. Const. art. VI, cl. 2

"Simply put, the Supremacy Clause invalidates state laws that interfere with, or are contrary to, federal law." *Board of Miami County Comm'rs v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 294, 255 P.3d 1186 (2011). In determining whether federal preemption is applicable in a given case, we must look to "the language of the pre-emption statute and the 'statutory framework' surrounding it." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996). Accordingly, because federal preemption involves an interpretation of law, our review is unlimited. See *Zimmerman v. Board of Wabaunsee County Comm'rs*, 289 Kan. 926, 974-75, 218 P.3d 400 (2009); see also *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, Syl. ¶ 18, 296 P.3d 1106 (2013).

The Kansas Supreme Court has identified several categories and subcategories of federal preemption:

"Broadly speaking, a preemption analysis divides into two principal categories, express and implied preemption. Implied preemption is further divided into two analytical subcategories: field preemption and conflict preemption. Then, yet a third strata of analytical subcategories is used when examining claims of conflict preemption: per se conflict and obstacle preemption. [Citations omitted.] Even though it is analytically helpful to consider the relationship of these categories, it must be remembered that these analytical categories are not 'rigidly distinct.' *English*, 496 U.S. at 79 n.5. For example, 'field pre-emption may be understood as a species of conflict pre-emption.' A state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation.' *English*, 496 U.S. at 79 n.5." *Board of Miami County Comm'rs*, 292 Kan. at 294-95.

Express preemption is applicable "when Congress makes its intent known through explicit statutory language." 292 Kan. at 295 (citing *English*, 496 U.S. at 79). On the

other hand, implied preemption is applicable "when Congress does not expressly preempt state law, but its intent to do so can be inferred from a statutory or regulatory scheme." 292 Kan. at 296 (citing *English*, 496 U.S. at 79). Thus, federal preemption is ultimately a question of congressional intent. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992).

In the present appeal, the WTA argues both express and implied preemption. Although the WTA asserts that the ICCTA expressly preempts state law regarding the removal and reconstruction of railroad tracks, it concedes that federal law does not expressly preempt the resolution of railroad crossing disputes by state courts. Nevertheless, it argues the congressional intent to preempt state courts from entering orders that would place an unreasonable burden on interstate commerce can be inferred from the language of the ICCTA.

Interstate Commerce Commission Termination Act

Congress enacted the ICCTA in 1995. The ICCTA abolished the Interstate Commerce Commission (ICC) and created the STB to regulate rail transportation in the United States. 49 U.S.C. § 10501(a)(1) (2006). Prior to the adoption of the ICCTA, there was confusion regarding the roles of federal and state governments to regulate railroads. Hence, the ICCTA was enacted "to reflect the direct and complete preemption of state economic regulation of railroads." H.R. Rep. 104-311, at 95-96 (1995).

The ICCTA provides that the jurisdiction of the STB over:

"(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers, and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, *is exclusive*." (Emphasis added.) 49 U.S.C. § 10501(b).

Furthermore, the ICCTA contains an *express* preemption provision, which states:

"Except as otherwise provided in this part, the *remedies provided* under this part with respect to regulation of rail transportation *are exclusive and preempt* the remedies provided under Federal or State law " (Emphasis added.) 49 U.S.C. § 10501(b)

Accordingly, "congressional intent is clear, and the preemption of rail activity is a valid exercise of congressional power under the Commerce Clause." *City of Auburn v U.S. Government*, 154 F.3d 1025, 1031 (9th Cir. 1998). "If a railroad line falls within [the ICCTA's] jurisdiction, the STB's authority over abandonment is both exclusive and plenary." *Railroad Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523, 530 (6th Cir. 2002). In other words, "Congress has delegated to the [STB] exclusive jurisdiction to regulate 'transportation by rail carriers' and 'the construction, acquisition, operation, abandonment, or discontinuance' of rail facilities . . . with the instruction that the agency 'ensure the development and continuation of a sound rail transportation system' [citation omitted]." *City of South Bend, IN v. Surface Transp. Bd.*, 566 F.3d 1166, 1168 (D.C. Cir. 2009).

In *Emerson v. Kansas City Southern Ry. Co.*, 503 F.3d 1126, 1130 (10th Cir. 2007), the United States Court of Appeals for the Tenth Circuit stated:

"[T]he courts have found two broad categories of state and local actions to be preempted regardless of the context or rationale for the action. The first is any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized.

"Second, there can be no state or local regulation of matters directly regulated by the Board—such as the construction, operation, and abandonment of rail lines (*see* 49 U.S.C. §§ 10901-10907), railroad mergers, line acquisitions; and other forms of consolidation (*see* 49 U.S.C. §§ 11321-11328); and railroad rates and service (*see* 49 U.S.C. §§ 10501(b), 10701-10747, 11101-11124)."

Moreover, the Kansas Supreme Court has recognized that "there are areas related to railroads and the possession and use of railroad right-of-way where Congress expressly preempts state law," noting:

"[T]he federal regulation of railroads . . . is both pervasive and comprehensive. See, e.g., *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981). Numerous court decisions recognize that Congress has exercised preemptive, if not exclusive, power to regulate the railroads. See, e.g., *Norfolk & Western R. Co. v. Train Dispatchers*, 499 U.S. 117, 128, 111 S.Ct. 1156, 113 L.Ed.2d 95 (1991) (Congress' intent to exempt railroads from antitrust laws and all other laws, including state and municipal laws, was 'clear, broad and unqualified'); *Chicago & N.W. Tr. Co.*, 450 U.S. at 320 (ICC's [now STB's] abandonment authority is 'plenary' and 'exclusive'); *Missouri Pacific R.R. Co. v. Stroud*, 267 U.S. 404, 408, 45 S.Ct. 243, 69 L.Ed. 683 (1925) (Congress' acts concerning interstate commerce are 'supreme and exclusive').

"In addition, through other legislation, Congress has exercised federal authority over railroad rights-of-way when possessed for railway purposes. For example, the STB preemption statute provides that the STB's jurisdiction over 'the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities . . . is exclusive.' 49 U.S.C. § 10501(b) (2010). This provision continues with an express statement of preemption: '[T]he remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.' 49 U.S.C. § 10501(b)." *Board of Miami County Comm'rs*, 292 Kan. at 295-98.

As such, it is apparent "that a state or local law that permits a non-federal entity to restrict or prohibit the operations of a rail carrier is preempted under the ICCTA." *Norfolk Southern Ry Co v City of Alexandria*, 608 F.3d 150, 158 (4th Cir. 2010). But states and municipalities "may exercise traditional police powers . . . to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions." *Green Mountain R.R. Corp. v Vermont*, 404 F.3d 638, 643 (2d Cir. 2005). Therefore, the ICCTA "preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation." *Adrian & Blissfield R. Co v Village of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008)

Application of ICCTA

FYG argues that the WTA waived its right to assert federal preemption as a defense. Based on our review of the record, however, we find that the WTA timely asserted that the STB has exclusive jurisdiction over the removal of railroad track. As noted in *Wichita Terminal Association II*, it was the district judge handling the hearing held on June 9, 2009, who *sua sponte* raised the possibility of removing the north railroad track to accommodate the construction of a crossing at Emporia Court. As such, the panel in *Wichita Terminal Association II* found that "the district court abused its discretion in ordering removal of the track" and it reversed "that portion of the [July 20, 2009] order in which the district court *sua sponte* ordered a remedy that was neither proposed by the parties nor supported by the evidence" 2011 WL 588505, at *6, 11

A review of the record reveals that counsel for the WTA immediately questioned the district court's authority to order the removal of railroad track when the judge first raised this issue at the hearing on June 9, 2009. In addition, the WTA filed an objection to

the proposed journal entry following the hearing on the grounds that the district court exceeded its jurisdiction and authority because the removal of railroad tracks falls under the exclusive jurisdiction of the STB as set forth in the ICCTA. Furthermore, the WTA expressly presented the issue of STB jurisdiction to a panel of this court in *Wichita Terminal Association II*. In particular, the WTA argued in the second appeal that the remedy ordered by the district court was "preempted by the ICCTA because it forces abandonment of the track and results in an unreasonable burden on interstate commerce." 2011 WL 588505, at *6. Although the panel in *Wichita Terminal Association II* did not reach the issue, we conclude that the WTA timely asserted and therefore preserved the issue of federal preemption.

As indicated above, the ICCTA expressly grants exclusive jurisdiction to the STB over "the construction, acquisition, operation, abandonment, or discontinuance" of railroad tracks 49 U.S.C. § 10501(b)(2). Likewise, 49 U.S.C. § 10903(d) (2006) requires the approval of the STB before an interstate rail carrier can be lawfully abandoned. "In general, this abandonment licensing requirement applies to all carrier lines, including both 'main' lines and 'branch' lines" *Joseph R. Fox—Petition for Declaratory Order*, 2009 WL 1383503, at *2 (S.T.B. 2009). Furthermore, even a railroad track "excepted under 49 U.S.C. 10906 from the need to obtain Board authority for the construction, abandonment, or operation, is nevertheless subject to the Board's jurisdiction and is not subject to state or local regulation " 2009 WL 1383503, at *3, see also *United Transp. Union v. Surface Transp. Bd.*, 183 F.3d 606, 612 (7th Cir. 1999).

In *Port City Properties v. Union Pacific R. Co.*, 518 F.3d 1186, 1188 (10th Cir. 2008), the Tenth Circuit noted that 49 U.S.C. § 10906 provides that "the STB has no authority over the regulation of spur and industrial tracks as opposed to main railroad lines." But "[t]hat authority is left entirely to railroad management who may contract services as they see fit " 518 F.3d at 1189 "In sum, Congress granted exclusive jurisdiction to the STB over the construction, operation, and abandonment of spur or

industrial lines, thereby precluding state regulation" and "then withdrew regulation of such lines from the STB leaving their management solely to the respective railroads " 518 F 3d at 1189.

In *Union Pacific Railroad Company—Judgment with Order*, 2001 WL 1396718 (S.T.B. 2001), the STB held that a city could not require a rail carrier to remove tracks without filing an application for adverse abandonment. In reaching this holding, the STB noted that "[t]he board and the courts have consistently held that such local regulation [of railroad carriers] is precluded." 2001 WL 1396718, at *3 (citing *New Orleans Terminal Company v. Spencer*, 366 F.2d 160, 163-64 [(5th Cir. 1966)] (an ordinance requiring the removal of railroad crossings was unenforceable); *City of Des Moines, Iowa v. Chicago & N.W. Ry. Co.*, 264 F.2d 454, 457-60 (8th Cir. 1959) (city could not oust a rail carrier from using streets without abandonment authority)

Although it is unfortunate that this action must be further delayed, we are obligated to conclude as a matter of law that the STB has exclusive jurisdiction over the question of whether the WTA should be required to remove the north track and to construct a new track south of the existing tracks. Accordingly, we vacate those portions of the journal entry filed on January 25, 2012, which purport to require the "removal of the north track coupled with the laying of a new track south of the existing tracks." We also conclude that it is within the exclusive jurisdiction of the STB to determine whether constructing a permanent railroad crossing at Emporia Court is impossible or would unreasonably burden interstate commerce—even with the relocation of north track—as the WTA contends.

Under the ICCTA, a rail carrier or a third party may file a petition seeking a declaration of abandonment of a railroad track. See *Modern Handcraft, Inc.*, 363 I.C.C. 969, 971 (1981) (adjacent landowner has standing to bring adverse abandonment action). During oral argument, counsel for the WTA represented that his client was willing to file

an application with the STB for determination of the issues within its jurisdiction. Because the WTA has been under an order to provide access to FYG's real property by installing a permanent railroad crossing at Emporia Court for several years, we believe it is appropriate for the WTA to initiate an action before the STB to obtain a determination of those questions within the STB's jurisdiction. Of course, if FYG would prefer to commence an adverse abandonment action in the STB, it may do so.

"In the case of an 'adverse' abandonment proceeding—one brought by a party other than the carrier whose operating authority is at issue—[a] finding that the public convenience and necessity do not require . . . operation of the track by the carrier in question removes [the STB's] exclusive and plenary jurisdiction as a regulatory obstacle to abandonment, thereby enabling the parties to undertake other legal remedies . . . Where no overriding federal interest exists, [the STB] will not allow [its] jurisdiction to be used to shield a carrier from the legitimate processes of state law [Citation omitted.]" *CSX Corporation and CSX Transportation, Inc —Adverse Abandonment Application*, 2002 WL 127074, at *4 (S T B. 2002).

Thus, the STB may impose appropriate remedies and/or decide if "removal of [its] jurisdiction as a shield against state law is in the public interest." 2002 WL 127074, at *4

Finally, we have no reason to dispute the district court's conclusion that "the most viable option for providing access to F.Y.G.'s real property is removal of the north track coupled with the laying of a new track south of the existing tracks " Moreover, we have no reason to dispute the district court's conclusion "that removal of the north track would allow the Emporia Court location to be built in compliance with the MUTCD." Based on our review of the record, we find that substantial evidence supported both of these conclusions. To enforce such a remedy, however, the STB must either relinquish its jurisdiction to the district court or approve of the removal and reconstruction of track to allow for the installation of a permanent railroad crossing at Emporia Court.

CONCLUSION

Accordingly, we remand this case to the district court and direct it to enter an order requiring the WTA to file an application with the STB to resolve any issues concerning the STB's jurisdiction no later than 60 days following the issuance of a mandate from this court. Until the STB has completed its review, the district court shall retain jurisdiction to enforce its order requiring the WTA to keep open a temporary crossing over its railroad tracks in order to provide reasonable access from 25th Street to FYG's real property.

Affirmed in part, vacated in part, and remanded with directions.

EXHIBIT B

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

WICHITA TERMINAL ASSOCIATION,
BURLINGTON NORTHERN & SANTA FE
RAILWAY COMPANY and UNION PACIFIC
RAILROAD COMPANY,

Plaintiffs,

v

F.Y.G. INVESTMENTS, INC., and TREATCO, INC.,

Defendants.

Case No. 02 C 3688

COPY

Pursuant to K.S.A Chapter 60

ORDER ON THIRD REMAND

Defendant F Y G. Investments, Inc. seeks enforcement of its right of access to 25th Street in Wichita from its 26-acre property just east of the intersection with North Broadway. Access is blocked by two side, railroad tracks owned and operated by the Wichita Terminal Association, Burlington Northern Santa Fe Railway Company, and Union Pacific Railway Company (together, the "WTA").

On July 2, 2013 the Kansas Court of Appeals entered its Modified Opinion on the third appeal of this case. After the second appeal, this court had heard evidence and entered its judgment on January 25, 2012. F.Y G.'s right of access had been previously established by final judgment, ordering the crossing to be provided at the platted location of Emporia Court Street, and on remand after the second appeal, the court was directed to consider again whether the crossing should be afforded at the Emporia Court location. After hearing the

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DISTRICT COURT
SEDGWICK COUNTY, KANSAS

evidence this court determined that the alternate location proposed by the Railroads was not viable and that: "the most viable option for providing access to F Y G's real property is removal of the north track coupled with the laying of a new track south of the existing tracks." This Court further concluded "that removal of the north track would allow the Emporia Court location to be built in compliance with the MUTCD." On the third appeal, the Court of Appeals found that the court's conclusions were supported by substantial evidence, and affirmed the judgment in part. Memorandum Opinion, p. 17 The Court of Appeals further concluded that "[t]o enforce such a remedy, however, the STB must either relinquish its jurisdiction to the district court or approve of the removal and reconstruction of track to allow for the installation of a permanent railroad crossing at Emporia Court." *Id*

The Court of Appeals felt it was "obligated to conclude as a matter of law that the STB has exclusive jurisdiction over the question of whether the WTA should be required to remove the north track and to construct a new track south of the existing tracks." The Court of Appeals therefore vacated "those portions of the journal entry filed on January 25, 2012, which purport to require the 'removal of the north track coupled with the laying of a new track south of the existing tracks '" Memorandum Opinion, p. 16. The Court of Appeals further found that the Surface Transportation Board has jurisdiction to determine that construction of a crossing at Emporia Court "is impossible or would unreasonably burden interstate commerce—even with the relocation of north track—as the WTA contends "

Accordingly, this court's judgment of January 25, 2012, is affirmed except with

respect to the remedy ordered in Paragraph 4, and this Court hereby complies with the mandate of the Court of Appeals by entering its Order as follows:

WTA is hereby required and directed to file an application with the STB to resolve any issues concerning the STB's jurisdiction no later than October 4, 2013. Until the STB has completed its review, this court shall retain jurisdiction to enforce its order requiring the WTA to keep open a temporary crossing over its railroad tracks in order to provide reasonable access from 25th Street to FYG's real property.

Each of the parties is directed to file with this court, on or before January 15, March 15, June 15, and September 15 of each year until the STB proceeding (including any judicial review thereof) is completed, a report on the status of the STB proceedings.

IT IS SO ORDERED.

JOSEPH BRIBIESCA

Hon. Joseph Bribiesca

Approved by:

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Attorneys for Defendants

EXHIBIT C



EXHIBIT
C

EXHIBIT D

1 IN THE EIGHTEENTH JUDICIAL DISTRICT COURT
2 DISTRICT COURT, SEDGWICK COUNTY, KANSAS
 CIVIL DEPARTMENT

3 WICHITA TERMINAL ASSOCIATION,)
4 BURLINGTON NORTHERN & SANTA FE)
5 RAILWAY COMPANY and UNION)
6 PACIFIC RAILROAD COMPANY,)
7 Plaintiffs,)
8)
9 vs.) Case No. 02 CV 3688
10)
11 FYG INVESTMENTS, INC. and)
12 TREATCO, INC.,)
13 Defendants.)
14)
15 _____

10 TRANSCRIPT OF BENCH TRIAL

11 Proceedings had and entered of record before the
12 Honorable Joseph Bribiesca, Judge of Division 22 of the
13 18th Judicial District, Sedgwick County, Kansas, at
14 Wichita, Kansas on November 21, 2011.

15 APPEARANCES:

16 The Plaintiffs, Wichita Terminal Association,
17 Burlington Northern & Santa Fe Railway Company and Union
18 Pacific Railroad Company, appeared by and through its
19 attorneys, Mr. K. Paul Day and Mr. Jeffrey R. King, of
20 Lathrop & Gage, LLP, 2345 Grand Boulevard, Suite 2200,
21 Kansas City, Missouri 64108-2618.

22 The Defendant, FYG Investments, Inc. and
23 TreatCo, Inc., appeared by and through its attorney, Mr.
24 Wyatt Hoch, of Foulston Siefkin, LLP, 1551 N. Waterfront
25 Parkway, Suite 100, Wichita, Kansas 678206-4466.

BECKY A. FITZMIER, CSR, RMR
OFFICIAL COURT REPORTER

EXHIBIT
D

- 1 struck by the -- the car, or if a car man is on --
2 riding on the side of the car, which in this area they
3 would be.
- 4 Q. So WTA or BNSF employees actually hang on the side of
5 these cars as they move across the interchange?
- 6 A. Yes. .
- 7 Q. And one of the reasons for that clearance issue is to
8 protect the trainmen from hitting the sign --
- 9 A. Yes.
- 10 Q. -- on a moving train, correct?
- 11 A. Yes, sir.
- 12 Q. All right. Sorry I got side-tracked there, but I want
13 to talk to you about industry standards for placement
14 of these signs. We talked about the requirements
15 under the MUTCD. Are there also separate industry
16 standards with regard to how close these signs can be
17 to the tracks?
- 18 A. Yes.
- 19 Q. Have you done any consulting work for BNSF and UP?
- 20 A. Yes, I have.
- 21 Q. What kind of consulting work have you done for them?
- 22 A. On different crossing concerns, on crossing closings,
23 on difficult crossings, on what type signals to
24 install, and involved in quiet zones.
- 25 Q. Okay. Would that include determining how far under

1 these industry standards these signs should be from
2 the tracks?

3 A. Yes, what's the best location for the signage.

4 Q. All right. MUTCD is 12 feet. What is the industry
5 standard with regard to the distance a crossbuck needs
6 to be from a set of railroad tracks?

7 A. It's -- normally, it's 15 feet from the near rail --

8 Q. All right.

9 A. -- the post would be set in the ground, 15 feet from
10 the near rail, where the post would be set in the
11 ground.

12 Q. All right. Now, earlier you talked about these yield
13 signs being installed next to or underneath the
14 crossbucks; you remember that testimony?

15 A. Yes.

16 Q. Is there a new requirement under the MUTCD that a
17 yield sign, in conjunction with a crossbuck sign, has
18 to comply with the 15-foot industry standard rather
19 than the 12-foot MUTCD standard?

20 A. Yes. First of all, there's the new requirement in the
21 2009 Edition was to shall -- a crossbuck shall have
22 either a yield sign or a stop sign placed either on it
23 or beside it, depending on the circumstances. And
24 then if it -- if it is either one of those signs, and
25 the default is the yield sign if no decision is made,

- 1 then they -- chose need to be 15 feet from a near
2 rail.
- 3 Q. Let me hand you what I've marked as Plaintiffs'
4 Exhibit 13. You recognize that photograph?
- 5 A. Yes.
- 6 Q. What is it?
- 7 A. Those -- that's a photograph taken yesterday showing
8 the 15-foot cone where the -- the crossbuck would be
9 located and the yield sign.
- 10 Q. Did you take the photograph?
- 11 A. Yes, I did.
- 12 Q. And was I with you yesterday?
- 13 A. Yes, you were.
- 14 Q. Is that my car in the photograph?
- 15 A. Yes. That's your brand new car.
- 16 MR. DAY: Judge, I'd offer Plaintiffs'
17 Exhibit 13.
- 18 THE COURT: Any objection?
- 19 MR. HOCH: No, sir.
- 20 THE COURT: All right. Plaintiffs' 13 shall
21 be admitted.
- 22 Q. (By Mr. Day) The -- as you face the photograph, the
23 cone nearest the cracks, what measurement is that from
24 the rail?
- 25 A. The cone on the left is 15 feet from the near rail.

1 Q. And the cone on the right?

2 A. Seventeen feet.

3 Q. And why did you put a cone 17 feet from the rail?

4 A. Well, that second cone would depict if -- you can't
5 just put a crossbuck out there in that roadway, 'cause
6 it's not going to last very long. So my
7 recommendation if a crossing went there, that that
8 second cone would depict where the edge of the curb
9 would be, 'cause the curb would need to be constructed
10 alongside that -- that track.

11 Q. Why do you need a curb?

12 A. Well, the requirement for -- on the crossing for the
13 crossbuck would have -- it needs to be two -- roughly
14 two feet three inches from the edge of the crossbuck
15 sign to the face of the curb. So that when a motorist
16 would be going across the crossing, there -- you know,
17 if they're up against a curb, their side mirror is not
18 going to hit the -- the crossbuck. And in this case,
19 even though the crossbuck would be flat, you know,
20 that you'd see as -- coming on 25th Street, say, if
21 you were approaching on the eastbound lane, you'd need
22 also two feet away from the crossbuck so that your
23 rear view -- or your outside mirror would not hit the
24 crossbuck, so it needs to be out there, you know, two
25 feet away from the curb.

- 1 Q. Okay. Exhibit -- Plaintiffs' Exhibit 13, under the
2 MUTCD requirements with regard to yield signs and with
3 regard to industry standards, you're at the location
4 of the Emporia Court crossing, the crossbuck and yield
5 sign is basically in the middle of 25th Street, isn't
6 it?
- 7 A. Yes.
- 8 Q. Is that hazardous?
- 9 A. Yes.
- 10 Q. Why is it hazardous?
- 11 A. Well, it's going to be sitting out right in the middle
12 of a roadway, and people are not going to know where
13 to -- to drive around it, how is it protected. You're
14 going to put barriers around it, it would be in an
15 island out there and all by itself for -- between it
16 and the yield sign.
- 17 Q. Generally not appropriate to put warning signs out in
18 the middle of a public road?
- 19 A. No.
- 20 Q. Let me hand you what I've marked as Plaintiffs'
21 Exhibit 3-A. Take that back. 3-A is the blow-up.
22 Let me hand you what I've marked as Plaintiffs'
23 Exhibit 3. What is -- or I should say, what are
24 Plaintiffs' Exhibit 3 and Plaintiffs' Exhibit 3-A?
- 25 A. It -- this -- this is the drawing that was provided by

- 1 under industry standards, 25th Street has to be moved
2 some distance to the north?
- 3 A. Yes.
- 4 Q. How far?
- 5 A. It's approximately 20 feet.
- 6 Q. Okay Do you know what the 250-foot rule is under in
7 the railroad industry?
- 8 A. Yes. It's a site distance obstruction rule that
9 requires railroads to keep vegetation and any debris,
10 material back 250 feet from the crossing as well as
11 any stored railroad cars from the edge of the crossing
12 back 250 feet in each direction
- 13 Q. All right Did you measure the length of the IT
14 tracks --
- 15 A. Yes.
- 16 Q. -- along 25th Street?
- 17 A. Yes.
- 18 Q. How did you measure 'em?
- 19 A. I had a roller wheel.
- 20 Q. A what?
- 21 A. Roller wheel. Measuring wheel
- 22 Q. How does that work?
- 23 A. It's -- you -- just has a little wheel, and you roll
24 it, and it measures the feet by actually inches and
25 records it in footage.

1 Q. All right. And how long is the interchange?

2 A. Well, from switch to switch, it's probably close to a
3 thousand feet, from the west switch to the east
4 switch. What I was looking at were the -- kind of
5 the -- the clearance areas where the -- the -- the
6 track -- where the two tracks come together, they
7 would be fouling each other, so that you couldn't set
8 a car closer on one track to that close enough to the
9 switch, because it would interfere with -- get too
10 close to the second track as it angles in towards it.

11 Q. Utilizing Plaintiffs' 3-A, can you illustrate that for
12 the Court?

13 A Well, at this -- let's just say at the west end where
14 the switch comes off, you can't put these cars up real
15 close to the switch, because they'll hit each other.
16 And it was about -- probably a distance of, I'm just
17 guessing from there, maybe 125 feet from the switch
18 before the first clearance would be obtained where you
19 could set that car. So to answer your first question,
20 from the clearance point there on the west end to the
21 east end was right at 850 feet.

22 Q. All right. And if there is a crossing, Emporia Court
23 crossing as shown on Exhibit 3-A, if that's
24 constructed, how does the 250-foot rule work?

25 A. Well, anything from this edge of the crossing in each

- 1 direction, 250 feet back here and 250 feet to the
2 east, will have to be kept clear when they come in and
3 store cars.
- 4 Q. And that's so motorists who could be making a right or
5 left onto Emporia Court can see down the tracks and
6 make sure a train is not coming?
- 7 A. That's correct.
- 8 Q. The law in Kansas is that the distance must be
9 reasonable --
- 10 A. Yes.
- 11 Q. -- by Kansas statute. Do you have an opinion, based
12 on your training and experience, work history, what is
13 a reasonable distance that cars should be moved back
14 from the crossing?
- 15 A. Well, it's going to vary on your speed of your trains,
16 but 250 is a good minimum distance for the crossing
17 such as this and speeds that would be a good distance
18 to have it cleared. If you're at a higher speed, then
19 you're going to need more of a visibility.
- 20 Q. Okay. If the train speeds at this location, 250 feet,
21 you think, is reasonable?
- 22 A. Is adequate, yes.
- 23 Q. All right. Is that the law in other states?
- 24 A. Yeah -- mostly it's 250. There's some exceptions
25 where it's -- some states have a little bit longer.

- 1 Q All right. When you measured the length of the
2 interchange track at clearance points at 850 feet,
3 were you able to make a calculation as to the storage
4 capacity of those two tracks with regard to rail cars?
- 5 A. Yes
- 6 Q. And how did you do that?
- 7 A. Well, really went from the center of the roadway,
8 which the roadway is going to be 41 feet wide, so it
9 went to the middle, and the crossing service would
10 have to be two feet outside of that roadway, so it's
11 roughly -- I took 25 feet from the center of the
12 roadway, added that to 250 feet, so you got 275 feet,
13 both east and west down the tracks.
- 14 Q. And what -- what did you come up with -- well, what
15 did you assume to be the car length?
- 16 A. The rail cars that are generally used on their grain
17 and hoppers would be tank cars, would be roughly 60
18 feet long..
- 19 Q. Are you familiar with the various industries that are
20 served by the interchange track?
- 21 A. Well, there were mostly grain and -- and then there's
22 scrap metal and different types of -- mostly grain
23 elevators.
- 24 Q. What kind of rail car service, those types of things?
- 25 A. Those would be hopper cars and tank and --

- 1 Q. Sixty-footers?
- 2 A. Yes, generally.
- 3 Q. What was the car capacity of the entire interchange,
4 based on your calculation --
- 5 A. About --
- 6 Q. -- both tracks?
- 7 A. About 30 cars.
- 8 Q. Thirty cars in total, so 15 cars on each track?
- 9 A. Well, 13 on the north, 15 on the south.
- 10 Q. And that's because of the clearance --
- 11 A. Yes
- 12 Q. -- point issue we talked about earlier where the
13 tracks come together?
- 14 A. Yes.
- 15 Q. And assuming the Emporia Court crossing is installed
16 at the location proposed by the defendants, how does
17 that impact the rail car storage capacity of those
18 tracks?
- 19 A. That basically wipes out 18 storage cars, cars that
20 would be stored there, can only have room for 12.
- 21 Q. About a 60 percent reduction?
- 22 A. Yes.
- 23 Q. And how would such a loss of storage capacity impact
24 switching operations on the BNSF and WTA?
- 25 MR. HOCH: Excuse me. Objection,

1 foundation..

2 THE COURT: Sustained

3 Q. (By Mr. Day) You're familiar with the location of the
4 temporary crossing?

5 A. Yes.

6 Q. Spoke about that earlier. Assuming that is made the
7 permanent rail crossing for access to the land where
8 Emporia Court is proposed, how does the 250-foot rule
9 work there? Do you understand my question?

10 A. Yeah. It applies the same. You need 250 feet
11 clearance from the edge of the crossing, and the car
12 storage, then, the switch is just to the west there,
13 and on the north track, I think you'd lose maybe
14 one -- one car, and on the south one probably three,
15 maybe, maybe four. So if the crossing were there,
16 instead of having 30, they would have either 25 or 26
17 spots for storage.

18 Q. Okay. We lose some space, but not near as bad if it's
19 in the middle?

20 A. My opinion, they could live with that.

21 Q. Okay. Now, last thing I want to talk to you about,
22 Mr. Mooney, is track removal. Based on your analysis,
23 would removal of a section of the north track solve
24 the clearance issues we've talked about under the
25 MUTCD and industry standards?

1 A. No-

2 Q. Why?

3 A. You'd still have the same for the south track.

4 Q. Okay. And would you still have, based on the 15 foot
5 and the 17-foot rule, warning devices in the public
6 thoroughfare of 25th Street, if it's not realigned?

7 A. Yes.

8 Q. Is that a safe situation?

9 A. No. It would not be.

10 Q. Is it hazardous?

11 A. Yes.

12 (Mr. Day confers with Mr. King.)

13 MR. DAY: Judge, I think that concludes my
14 examination. I'll pass the witness to Mr. Hoch.

15 THE COURT: All right. Cross?

16 MR. HOCH: Thank you, Judge.

17 CROSS-EXAMINATION

18 BY MR. HOCH:

19 Q. Good morning, Mr. Mooney.

20 A. Good morning.

21 Q. Want to make sure that I understand what your
22 understanding is of how these two tracks along the
23 south side of 25th Street are used by the railroads.
24 Are these two tracks used as an interchange between
25 the Burlington Northern main line, which runs up and

1 Q. Have -- have you done any study as to whether the
2 railroads could build another track to the south of
3 the current track location, take out the north track?

4 THE COURT: Would you have the witness hold
5 that exhibit up so I can conceptualize what you're
6 talking about?

7 MR. HOCH: Absolutely.

8 THE COURT: Thank you

9 Q. (By Mr. Hoch) My question, Mr. Mooney, is whether
10 you've made any study to figure out whether another
11 track could be built to the south of the current south
12 track to put cars on when the north track is taken out
13 and abandoned?

14 A. No. I have not.

15 Q. Did you ever visit with anybody at the railroads about
16 that possibility?

17 A. No.

18 Q. Do you know whether anybody at the railroads has ever
19 asked from the landlord whether they could get a
20 right-of-way to build another segment of track along
21 there?

22 A. No.

23 Q. Are you aware, Mr. Mooney, of the City of Wichita
24 ordinance dealing with how long rail cars can block a
25 particular crossing?

- 1 A. They tie into our -- what we call our lead, which you
2 could probably see that's it right there (indicating).
3 If the two pages come together, it would look like
4 that.
- 5 Q. Right. Okay. And so are you interchanging tracks
6 between BNSF's main line and BNSF's customers on the
7 other side of the interchange?
- 8 A. Can you say that again, please?
- 9 Q. That was a terrible question. The cars that are
10 moving over the interchange from BNS -- BNSF's main
11 line, where are they going?
- 12 A. Several places.
- 13 Q. Give me an example.
- 14 A. Coming to -- coming to my operation?
- 15 Q. Okay.
- 16 A. They go to -- they could go to Bartlett elevator,
17 which is north of town, or the scrap dealers, any of
18 the scrap dealers or any of the other elevators that I
19 have. We mostly do grain. Our biggest share of the
20 business is the elevators we have here, Cargill,
21 Horizon Milling, Bartlett, Ralston-Purina, and few
22 scrap dealers.
- 23 Q. Okay. By grain, do you mean wheat?
- 24 A. Wheat, corn, soy -- soybeans --
- 25 Q. All right.

- 1 A. -- different commodities.
- 2 Q. And those --
- 3 A. Flour.
- 4 Q. I'm sorry?
- 5 A. Flour, oil.
- 6 Q. Okay. And those cars that are being interchanged over
7 the IT track from BNSF's track, are those moving in
8 interstate commerce?
- 9 A. Yes. They would be.
- 10 Q. Okay. Are the products that are being shipped from
11 the customers you just mentioned, either from or to
12 those customers, going outside the state of Kansas?
- 13 A. Probably most of it, yes.
- 14 Q. Give me a percentage.
- 15 A. I'd say 90 percent of it.
- 16 Q. How many cars per day does the Wichita Terminal
17 Association interchange over the IT tracks?
- 18 A. Ninety -- up to 90 cars a day on those particular
19 tracks.
- 20 Q. All right. And you listened to the testimony earlier
21 from Mr. Mooney about the storage capacity of those
22 tracks. Do you agree with those numbers?
- 23 A. It's pretty accurate, I believe.
- 24 Q. Okay. How would the -- well, the -- and you heard the
25 testimony about the 250-foot rule with regard to the

1 crossings?

2 A. Yes, sir.

3 Q. What is -- again, what does that mean?

4 A. Well, for safety standards and city local government
5 and state regulations, there's got to be a certain --

6 THE COURT. Sir, I realize you don't come to
7 court to testify every day, but try not to turn your
8 back to the court reporter.

9 THE WITNESS: Oh, okay.

10 THE COURT. Okay.

11 A. The crossings have to be cut or the train has to be
12 severed and -- and put in a distance to where it's not
13 to where there would be obstructions from traffic.

14 Q. (By Mr. Day) Okay. In other words, the train cars
15 have to be 250 feet back from the edge of the crossing
16 in both directions?

17 A. Correct.

18 Q. All right. And Plaintiffs' Exhibit 3-A, if the
19 Emporia Court crossing is installed at the proposed
20 location, and those cars have to be moved back 250
21 feet, how does that impact WTA's switching operations?

22 A. Well, it's -- it's drying up our capacity. We don't
23 have -- like I say, we don't have the trackage rights
24 just to take cars into the Burlington Northern yard,
25 so we have to store 'em there for them to come to get

- 1 'em.
- 2 Q Okay.
- 3 A. And likewise, them to us. So they -- they deliver to
4 the interchange, we pull, and then we fill it back up,
5 and then they clear it off again, so this goes on
6 constantly during the day and the week.
- 7 Q. Would it have a -- a negative impact on your
8 operations?
- 9 A. Yeah. It's going to take us from almost, like, 30
10 cars down to over 50, 60 percent reduction and what we
11 can take over there at a time.
- 12 Q. And what does that do to your switching operations?
- 13 A. It kind of handcuffs our switching operations, because
14 we don't have storage capacity, per se, on the WTA.
- 15 Q. All right.
- 16 A. We -- we -- you know, we're a switching operation, a
17 third-party switching operation.
- 18 Q. Now, those IT tracks, they're used for storage,
19 correct?
- 20 A. Can be, yeah.
- 21 Q. Both tracks?
- 22 A. Yep. Yes, sir.
- 23 Q. And they're also used for through train movements,
24 correct?
- 25 A. Very little, but it could be. Yes.

- 1 Q. All right. May -- that's probably the wrong term.
2 What I meant to say is they're -- not only are they
3 used for storage, they're also used for interchanging
4 cars to the various industries to the east?
- 5 A. Correct.
- 6 Q. Okay. And that would be both -- both sets of tracks?
- 7 A. That's -- that's correct.
- 8 Q. What if a portion of the north track is taken out, how
9 would that affect your operations?
- 10 A. It's capacity.
- 11 Q. All right.
- 12 A. You know, it's -- it's capacity that we don't have to.
13 spare, without going and building tracks somewhere
14 else.
- 15 Q. Would the installation of a crossing at the Emporia
16 Court location result in more frequent switching
17 operations on the terminal?
- 18 A. Yeah. It would take us from two to three a day to
19 possibly seven or eight a day.
- 20 Q. And can you explain that for the Court.
- 21 A. Well, we have to -- only being able to bring 12 cars
22 over at a time is we're going to have to make that
23 many more moves to get the 90 cars a day over, where
24 we'd do it in two or three now, then we're going to
25 have -- it's going to take us seven or eight. It's

1 going to cause us our budget impact on overtime, fuel
2 cost, car delays, customer dissatisfaction, car delay.
3 The Union Pacific is going to be holding cars for the
4 BN that we can't get over there to 'em,' because a lot
5 of those cars come from the -- we take from the Union
6 Pacific and take right over to the BN, so we -- we got
7 a lot of customers that's going to suffer from it, and
8 car delay.

9 Q. And would that be also true with respect to the
10 removal of any -- any portion of the north track?

11 A. Yes, sir.

12 Q. Basically, the result's the same, isn't it?

13 A. Yeah. Yes, sir.

14 Q. You know where the temporary crossing is located just
15 east of the west switch to the BNSF?

16 A. Yes, sir.

17 Q. Shown on Plaintiffs' Exhibit 3-A, it's basically in
18 this -- this location here (indicating), is that
19 correct?

20 A. Yes.

21 Q. Have you been out there recently?

22 A. I've been out there -- I go up there about every day.

23 Q. All right. This aerial shows the crossing here; do
24 you see it?

25 A. Yes, sir

- 1 Q. It doesn't show a road here, but is there a -- is
2 there a road currently at that location?
- 3 A. Not what I would say is a road, no, sir.
- 4 Q. Well, is there a path?
- 5 A. There is -- there is a -- a path, knocked-down weeds.
6 I think the city has been using to go in there and
7 clean some ditch -- ditches along that -- I think
8 they're along Broadway over there --
- 9 Q. Okay.
- 10 A. -- that they cleared off.
- 11 Q. But somebody's been driving vehicles through here
12 (indicating)?
- 13 A. Yeah. It's just basically just, like, down in there
14 and over that way (indicating).
- 15 Q. Okay. You think that's the city that's been doing
16 that?
- 17 A. I know it's the city.
- 18 Q. Did you talk to 'em? How do you know that?
- 19 A. Well, because I seen 'em going in and out of there.
- 20 Q. With their city work trucks?
- 21 A. Yes.
- 22 Q. Okay. How long has that -- I'm calling it a road or
23 path, whatever, how long has that been -- been there?
- 24 A. I just noticed it this week, but generally, when
25 I'm -- I go up there, there's cars could be blocking

- 1 that view of that or -- or the BN could be switching
2 over there or whatever, and I don't -- I didn't pay
3 any attention to it
- 4 Q. Okay. It was there on November 1st when I was there
5 with Mr. Mooney. Does that comport with your
6 recollection?
- 7 A. The road?
- 8 Q. The road.
- 9 A. I don't remember if it was that day or not when I
10 noticed that was in there.
- 11 Q. Fair enough. You know who built the path or the road?
- 12 A. I heard the city did.
- 13 Q. Okay.
- 14 A. My track supervisor, in fact, told me it was the city
15 did, when I asked him about it.
- 16 Q. If the Court orders the permanent crossing to be
17 located where the temporary crossing is located now,
18 would that have less of an impact on the WTA's
19 operation?
- 20 A. Yes, sir.
- 21 Q. And I mean that as compared to a permanent crossing at
22 the proposed Emporia Court location.
- 23 A. I still have my 30 cars the way it is.
- 24 Q. All right. Be less of an impact on your operations,
25 correct?

1 A. Oh, dramatically.

2 Q. All right.

3 MR. DAY. That's all the questions I have.

4 THE COURT: Just give me a second

5 Okay. Cross?

6 CROSS-EXAMINATION

7 BY MR. HOCH:

8 Q. Good morning, Mr. Dame.

9 A. Good morning.

10 Q. I think I have only a very few questions for you. I
11 want to understand, first of all, about this
12 relationship between the WTA and the BNSF and Union
13 Pacific, okay?

14 A. Uh-huh.

15 Q. We had some testimony in a hearing two and a half
16 years ago about that, and I just want to make sure
17 that I remember it correctly. As I understand your
18 testimony, the Wichita Terminal Association is a
19 nonprofit corporation owned exclusively by the BNSF
20 and the UP?

21 A. 50/50.

22 Q. Now, I also heard you testify that -- that the WTA, I
23 think you used the word we don't have trackage rights
24 to be able to store cars in the BNSF yard?

25 A. We can't -- we can't physically take 'em in there.

EXHIBIT E



EXHIBIT
E

EXHIBIT F

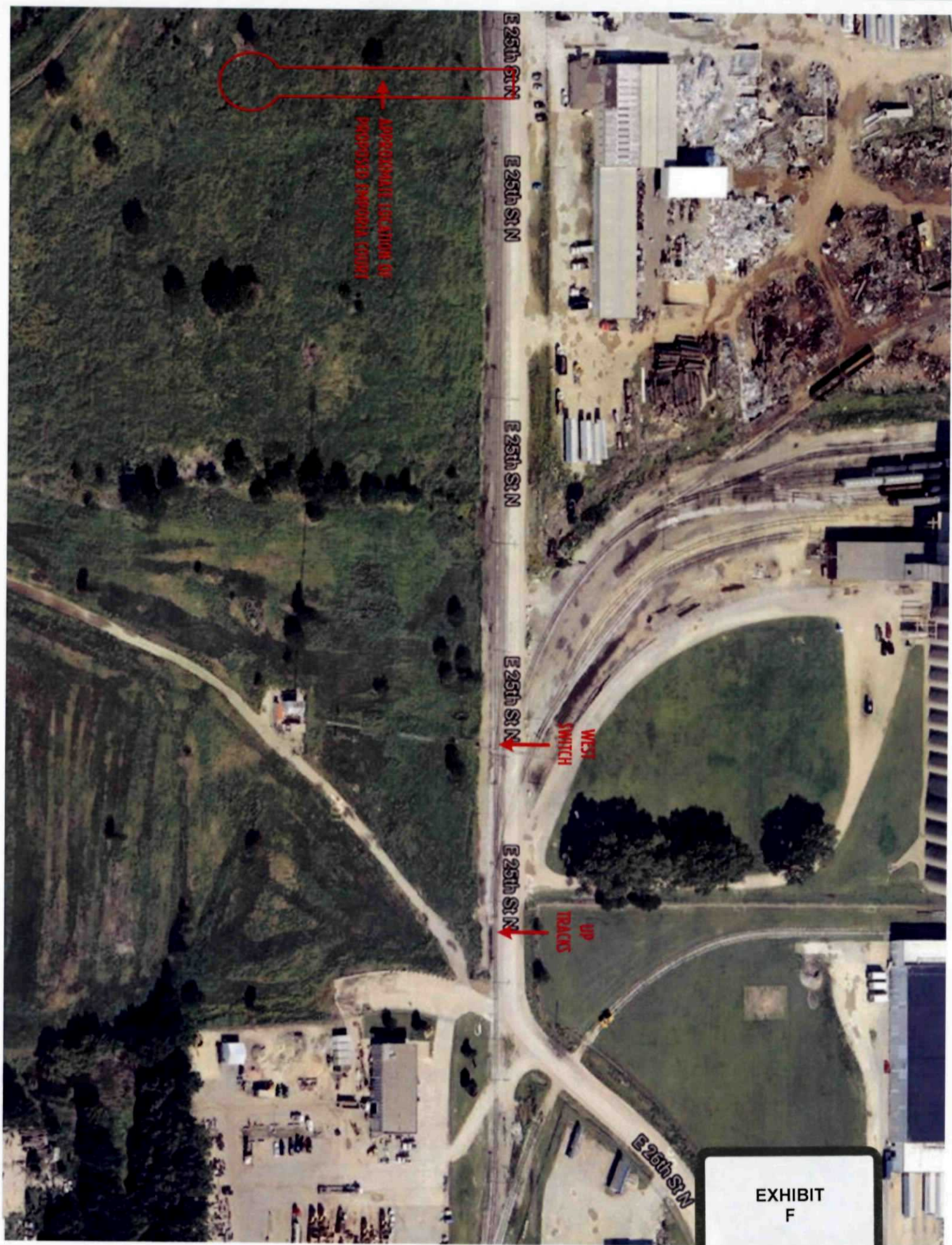


EXHIBIT
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6/2/2004

N Broadway St

E 32nd St N

TEMPORARY CROSSING

APPROXIMATE LOCATION OF
PROPOSED TEMPORARY COURT

EXHIBIT
G

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EXHIBIT H

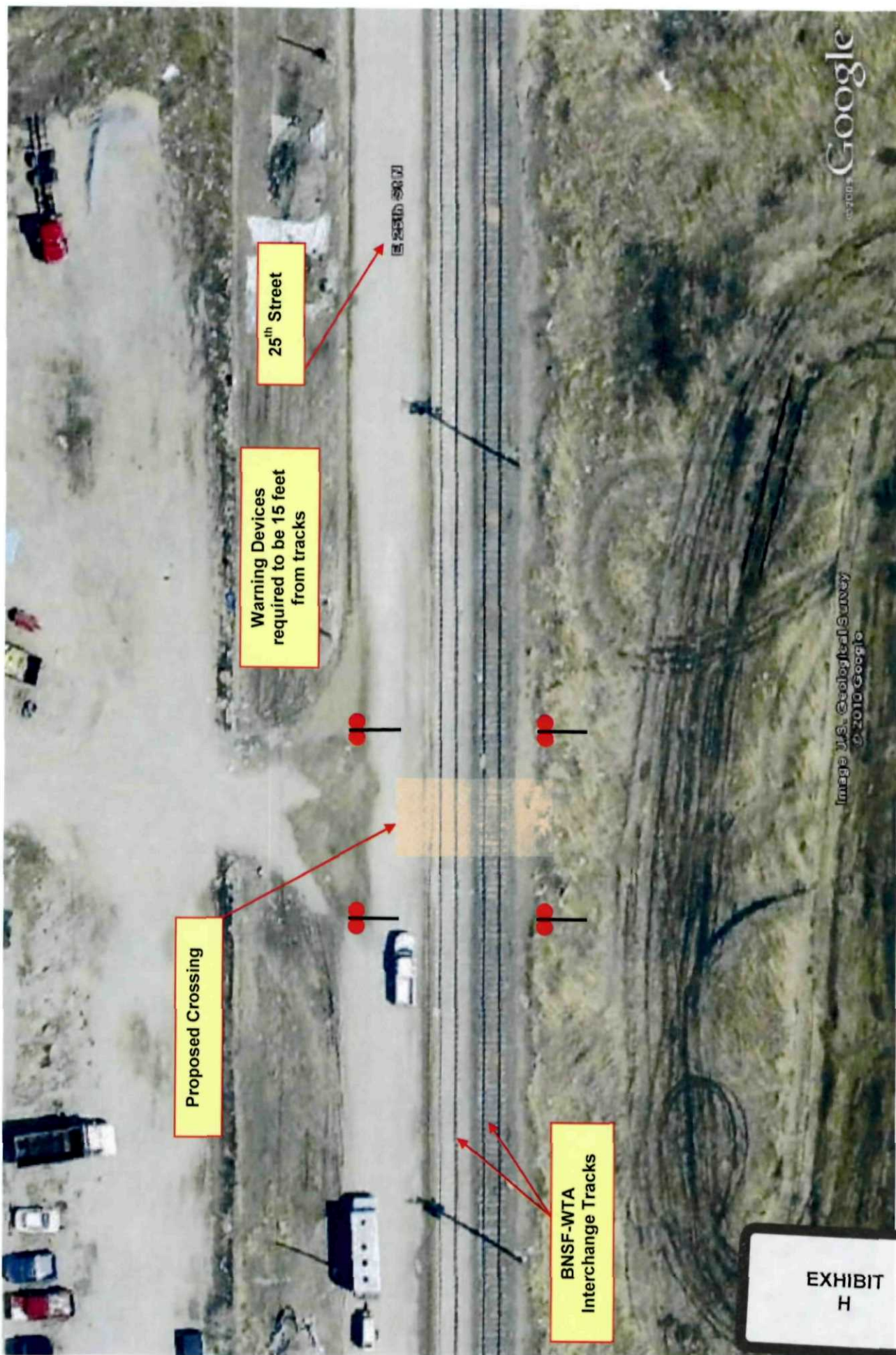


EXHIBIT
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EXHIBIT I



EXHIBIT
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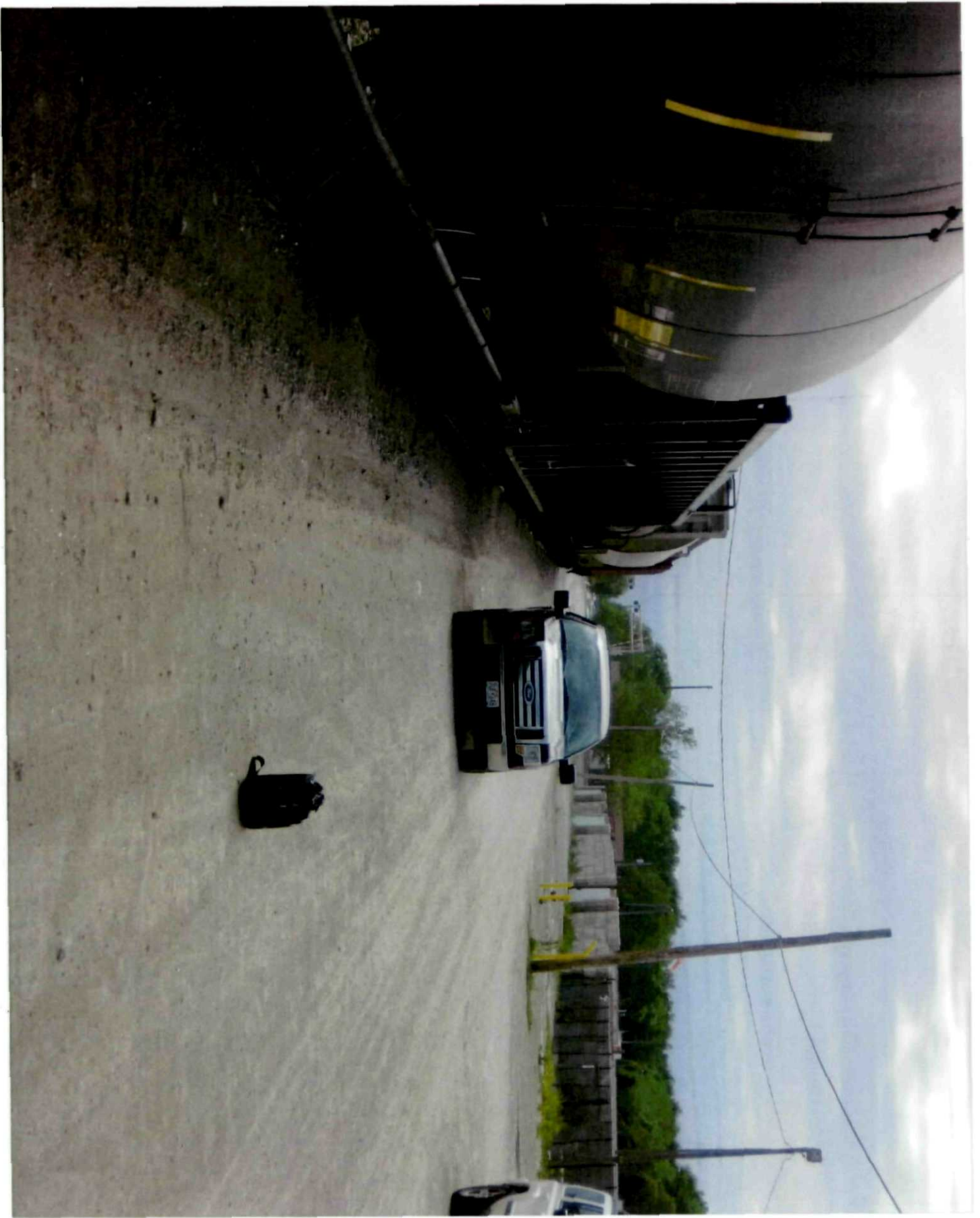
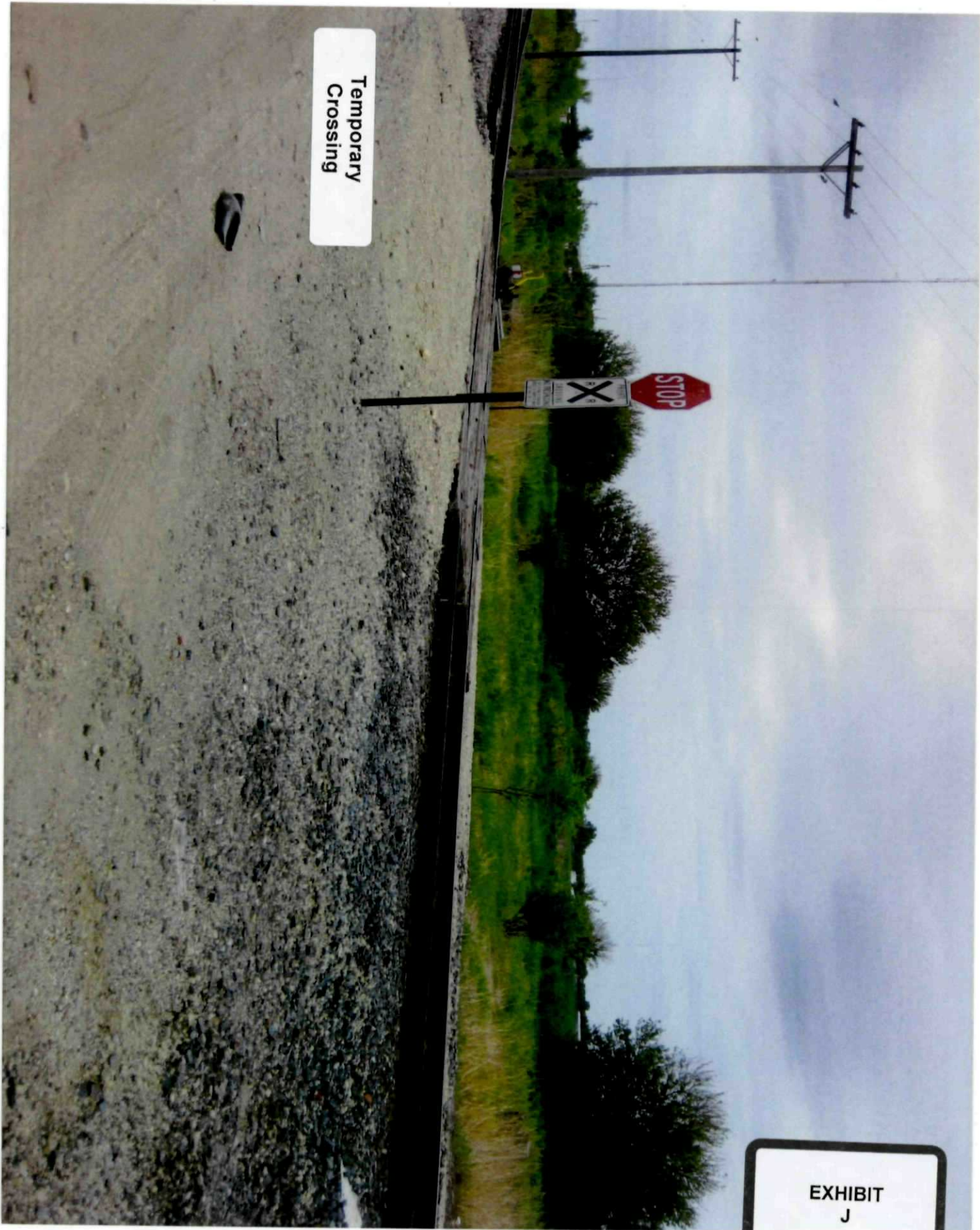






EXHIBIT J

EXHIBIT
J



Temporary
Crossing

EXHIBIT K



February 2013

EXHIBIT
K

EXHIBIT L

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Case No. 02 CV 3688

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PROCEEDINGS had before the Honorable Timothy Henderson, Judge of Division 24, of the District Court of Sedgwick County, Kansas, at Wichita, Kansas, on the 9th day of June, 2009.

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The Plaintiffs, Wichita Terminal Association, appeared by and through Mr. Mr. K. Paul Day, Attorney at Law, 2345 Grand Boulevard, Suite 2200, Kansas City, Missouri 64108.

The Defendants, FYG Investments, Inc., appeared in person and by and through Mr. Wyatt Hoch, Attorney at Law, 1551 North Waterfront, Parkway #100, Wichita, Kansas 67206.

EXHIBIT
L

1	<u>I-N-D-E-X</u>		
2	<u>PLAINTIFFS WITNESSES</u>		
3	JASON H. MOYER		
4	DIRECT EXAMINATION BY MR. DAY:		16
5	CROSS EXAMINATION BY MR. HOCH:		43
6	REDIRECT EXAMINATION BY MR. DAY:		62
7	BRUCE E. CHINN		
8	DIRECT EXAMINATION BY MR. DAY:		67
9	CROSS EXAMINATION BY MR. HOCH:		99
10	EXAMINATION BY THE COURT:		102
11	<u>RESPONDENT'S WITNESS</u>		
12	MARGIE THOMAS COLLINS		
13	DIRECT EXAMINATION BY MR. HOCH:		117
14	CROSS EXAMINATION BY MR. DAY:		129
15	REDIRECT EXAMINATION BY MR. HOCH:		150
16	EXAMINATION BY THE COURT:		153
17	REDIRECT EXAMINATION BY MR. HOCH:		154
18	<u>E-X-H-I-B-I-T-S</u>		
19	<u>PLAINTIFF'S EXHIBITS</u>	<u>OFFERED</u>	<u>ADMITTED</u>
20	PLAINTIFF'S EXHIBIT NO. 7-16:	30	30
21	PLAINTIFF'S EXHIBIT NO. 5-6:	40	40
22	PLAINTIFF'S EXHIBIT NO. 3:	40	40
23	PLAINTIFF'S EXHIBIT NO. 2:	40	41
24	PLAINTIFF'S EXHIBIT NO. 17:	91	91
25			

1 A. My name is Jason Moyer.

2 Q. And, Mr. Moyer, what is your current occupation?

3 A. I'm the superintendent of Wichita Terminal

4 Association.

5 Q. And what does it mean to be the superintendent

6 of the Wichita Terminal Association?

7 What are your duties?

8 A. I manage the daily operations of the switch

9 crews, the maintenance gangs, and clerical and

10 office staff.

11 Q. Are you located here in Wichita, Kansas?

12 A. Yes, I am.

13 Q. What is your business address?

14 A. 1537 Barwise Street (ph).

15 Q. Now, are you actually employed by the Wichita

16 Terminal Association?

17 A. No, I'm employed by BNSF railroad.

18 Q. BNSF signs your paychecks?

19 A. That is correct.

20 Q. And how is it that you would have the title of

21 the superintendent of operations for the

22 terminal when you are a BNSF employee?

23 A. Wichita Terminal is owned by the BNSF railway

24 and Union Pacific railroad equally.

25 Q. All right.

1 And do you know the business structure
2 of the terminal, is it a corporation?
3 A. It is an association.
4 Q. Association.
5 What is its purpose?
6 A. The Wichita Terminal serves as the switching
7 agent for both the UP and the BNSF, all traffic
8 that enters Wichita is served or is directed
9 towards customers in Wichita goes through the
10 Wichita Terminal. The terminal is the switching
11 agent for the shipping roads.
12 Q. So if I understand it, rail shipments would come
13 in either on the Union Pacific or the Burlington
14 Northern. And to get those shipments to
15 customers in Wichita, those rail cars would be
16 transported over the terminal.
17 Is that right?
18 A. Yes, they're interchanged both from the UP and
19 the BNSF to the terminal. The terminal will
20 serve the railroads customers, and either give
21 the traffic back in loaded form or empty form;
22 correct. Multiple commodities.
23 Q. Excuse me?
24 A. Multiple commodities.
25 Q. Does the terminal have its own employees?

1 Q. Okay.

2 You can sit down.

3 A. (Witness complied).

4 Q. We've been talking about the interchange track.
5 And I'd like you to give the court a little bit
6 more detailed explanation of the purpose or
7 function of that track.

8 What is it for?

9 A. The interchange track in question here, these
10 two tracks (indicating), are what ties the BNSF
11 and the UP to the WTA. All traffic, both again
12 multiple commodities, grain, all customer
13 traffic that is served in Wichita Central goes
14 across these two interchange tracks.

15 All bridge, we call it bridge move
16 traffic, between BNSF and UP interchange traffic
17 that goes, disperses all across the United
18 States, also goes over these two tracks.

19 Q. You know the approximate length of those two
20 tracks, either in feet or car storage?

21 A. Between the switches, on average, depending on
22 the car size, we'll store at least 40 cars.

23 Q. That's 40 cars total on both tracks?

24 A. Between the switches; correct.

25 Q. All right.

EXHIBIT M



25th Street

25th Street

Temporary Crossing

25th Street

EXHIBIT
M

July 2010

Good